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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-5781

FRANK RAKAS AND LONNIE KING, PETITIONERS

-vs-

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

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G. JOSEPH WELLER
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OF COUNSEL

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, is reported at 46 Ill. App. 3d 569, 360 N.E. 2d 1252 (1977) (See Appendix A). Also attached hereto is the unreported Order of the Appellate Court of Illinois, Third Judicial District, denying Petitioner's Petition for Rehearing (See Appendix B).

The Order of the Illinois Supreme Court denying Leave to Appeal is not reported, however, a copy of the Order is attached hereto (See Appendix C).

JURISDICTION

The Order of the Illinois Supreme Court was entered on September 30, 1977. This Court's jurisdiction is invoked under 28 U.S.C., §1257(3). This Petition for a Writ of Certiorari is filed within ninety days of that Order.

QUESTIONS PRESENTED FOR REVIEW

Whether a passenger legitimately present in an automobile has standing to challenge the constitutionality of a warrantless police search of the automobile in which he was riding.

Whether the person against whom a search is directed has an independent basis for standing to contest the lawfulness of the search.

CONSTITUTIONAL PROVISIONS

United States Constitution

Amendment (IV)

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment (XIV)

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the legal protection of the law.

STATEMENT OF THE CASE

The Petitioners, Frank L. Rakas and Lonnie L. King, were convicted of armed robbery in the Circuit Court of Kankakee County, Illinois. The most significant evidence against them was a rifle (People's Exhibit 1) which one of the robbery victims identified as being the same weapon used by the masked robbers (A80).[1]

This rifle was the subject of a Motion to Suppress filed by Petitioners prior to trial wherein it was asserted that the evidence had been illegally seized by police from a search of an automobile in which the Petitioners were, at that time, riding as passengers (A28-30). During the pre-trial hearing on the Motion, the Petitioners and Police Officer Donald Sollers testified as defense witnesses.

Officer Sollers testified that, while on patrol, he spotted a purple Plymouth Roadrunner, occupied by two males and two females, which he thought might be the blue Roadrunner used as a getaway car by the two unknown male robbers (A48). The car he saw, however, had a different license number than the getaway car and lacked other described characteristics (A50-51). Nevertheless, he followed the car to a lounge where the four occupants, i.e.

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[1] References are made to the Abstract of Record filed by Petitioners in the Appellate Court.

the Petitioners and their female companions, went inside for about forty minutes (A50). Sollers then telephoned the Sheriff's dispatcher and was told that one of the males, dressed in a blue shirt, matched the limited description given of one of the robbers (A49). [Testimony during the trial-in-chief established that the robbers wore ski masks (A59). Moreover, the clothing worn by the Petitioners when arrested (A58, 59, 61) did not match the clothing descriptions of the robbers given at trial (A58, 59, 61). Nor did the preliminary police reports, included in the record on appeal, suggest that the police were looking for men dressed as were the Petitioners (A5-8).]

After the Petitioners left the lounge and were again proceeding on the highway, an assembly of policemen stopped their car and ordered the occupants out at gunpoint (A49); and an ensuing search of the automobile then disclosed the rifle (A50). Before the search, none of the occupants were placed under arrest (A49), permission to conduct the search was not sought (A50), and the seized evidence was not visible from outside the car (A50).

The driver of the automobile was one of the Petitioners' female companions, Janette M. Clontz (A45). The Petitioners both agreed on cross-examination that Ms. Clontz was also the owner of the automobile in which they were riding as passengers (A46, 47). Consequently, the prosecutor made an oral motion to dismiss the Petitioners' Motion to Suppress on the ground that, since it was not their car, they had no standing to contest the legality of the search. The trial judge thereupon promptly granted the prosecutor's motion, without allowing the appointed defense counsel an opportunity to present contrary authority (A51-53). No further evidence was then offered by either side. [As a result, it was not revealed at the suppression hearing that Ms. Clontz was actually

the former wife of Petitioner King (See documents from the Common Law Record at A23 and A115).]

The Petitioners next challenged the lawfulness of the police search on appeal to the Illinois Appellate Court, Third Judicial District, which on March 23, 1977, affirmed the judgment of the trial court, summarily disposing of Petitioners' constitutional assertions by deciding that they lacked standing to complain of the disputed search. On April 13, 1977, the Appellate Court denied Petitioners' Petition for Rehearing.

On September 30, 1977, the Illinois Supreme Court refused to review this case and the constitutional claim made herein.

REASON FOR ALLOWING THE WRIT

THIS COURT IS REQUESTED TO SETTLE A QUESTION WHICH HAS BEEN CONFUSED BY CONFLICTING AUTHORITY, WHETHER A LEGITIMATE PASSENGER IN AN AUTOMOBILE HAS STANDING TO CHALLENGE THE LEGALITY OF A POLICE SEARCH OF THE AUTOMOBILE IN WHICH HE WAS RIDING; AND, ALSO THIS COURT IS REQUESTED TO DECIDE WHETHER THE "DIRECTED AT" THEORY FURNISHES A VALID, INDEPENDENT BASIS FOR STANDING TO CONTEST THE LAWFULNESS OF A SEARCH.

The underlying problem in this case should be relatively simple and clear-cut; and, no doubt, it involves a factual situation which frequently arises. Yet, there is an almost unexplainable split of authority in this area of the law. Due to the adverse rulings of the trial court and the Appellate Court as to the Petitioners' standing, without deciding the merits of their motion to suppress, it can be assumed for the purposes of this petition that the search of the automobile in which they were riding as passengers was unlawful. Consequently, the only issues presented herein concern the Petitioners' right to object to that search.

Petitioners, of course, rely first upon this Court's rationale in Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, 78 A.L.R. 2d 233 (1960) which apparently abolished subtle property law distinctions in the determination of standing to challenge the legality of a search. And, as further defined in Brown v. United States, 411 U.S. 223, 229, 93 S. Ct. 1565, 1569, 36 L. Ed. 2d 208, 214 (1973), the test announced by this Court seems to be that standing exists where the defendant either (a) is on the premises at the time of the contested search, (b) alleges a proprietary or possessory interest in the premises, or (c) is charged with an offense which includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. In the case-at-bar, the Petitioners initially assert their standing based upon the first criteria of the Brown test, their presence in the automobile at the time of the search. They have not claimed a proprietary or possessory interest in the automobile; nor were they convicted of an offense which includes, as an essential element, possession of the fruits of the search; although, it can fairly be said that they could not have been convicted were it not for the evidence thus obtained.

Unfortunately, most of the decisions by lower federal courts involve situations where the defendant was not actually in the car at the time of the disputed search and, therefore, are not directly on point, e.g., United States v. West, 557 F. 2d 151 (4th Cir., 1977). However, at least a few courts have recognized that the defendant's lawful presence in the car was sufficient to confer standing. See United States v. Holmes, 521 F. 2d 859, 867 (5th Cir., 1975), affirmed in relevant part on rehearing en banc, 537 F. 2d 227 (5th Cir., 1976); Bustamonte v. Schneckloth, 448 F. 2d 699, 700 n. 1 (9th Cir., 1971). reversed on other grounds, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); and United States v. Peisner, 311 F. 2d 94, 105, 5 A.L.R. 3d 1196, 1211 (4th Cir., 1963).

But see, United States v. Smith, 357 F. 2d 318, 320 (6th Cir., 1966) and Shurman v. United States, 219 F. 2d 282, 288 (5th Cir., 1955) cert. den. 349 U.S. 921, 75 S. Ct. 661, 99 L. Ed. 1253 (1955).

The greatest difficulty, though, arises when one attempts to reconcile holdings among the state jurisdictions. Indeed, a number of state courts have concluded that automobile passengers have standing to contest a search of the automobile in which they were riding.[2] On the other hand, decisions on point are by no means uniform. Some state courts, like in Illinois, have arrived at the opposite result by rejecting the Jones principle of "legitimately on the premises". Outlining the rationale of these decisions cannot be accomplished with any ease. However, suffice it to say, various state courts still prefer pre-Jones authority or have simply found Jones to be distinguishable where the premises searched was an automobile.[3]

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[2]See Mullins v. State, 35 Md. App. 605, 371 A. 2d 713, 716 (1977); State v. Bresolin, 13 Wash. App. 386, 534 P. 2d 1394, 1402 (1975); Wing v. State 490 P. 2d 1376, 1380 (Okla. Cr., 1971); and Paxton v. State, 263 N.E. 2d 636, 642 (Ind. S. Ct., 1970). See also, State v. Gaines, 40 Ohio App. 2d 224, 318 N.E. 2d 857, 861 (1974); Hodges v. State, 267 So. 2d 798, 802 (Ala., 1972); State v. Osborn, 200 N.W. 2d 798, 803-806 (Iowa S. Ct., 1972); People v. Marshall, 25 Mich. App. 376, 181 N.W. 2d 578, 580 (1970); and People v. Smith, 35 Misc. 2d 533, 230 N.Y.S. 2d 894, 900 (1962).

[3]The Supreme Court of Kansas, for example, in State v. Edwards, 197 Kan. 146, 415 P. 2d 231, 233-234 (1966), believed Jones to be distinguishable and, also, declined to follow United States v. Peisner, 311 F. 2d 94 (4th Cir., 1963). This is still the prevailing view in Kansas, e.g., State v. Heath, 222 Kan. 50, 563 P. 2d 418, 420 (1977). Another state which remains unaffected by Jones, so far as automobile passengers are concerned, is Missouri, notwithstanding an excellent treatment of Jones by the Supreme Court of Missouri in In Re J.R.M., 487 S.W. 2d 502, 505-509 (1972). But see, State v. Perkins, 543 S.W. 2d 805, 807-808 (1976) and State v. Browner, 514 S.W. 2d 355, 356 (1974). See also, the interesting comment in Ellis, 34 Missouri Law Review 575, 582-584 (1969). Some cases from other state jurisdictions of note include: Miller v. State, 520 S.W. 2d 729, 733-734 (S. Ct. Tenn., 1975), cert. den. 423 U.S. 849, 96 S. Ct. 91, 46 L. Ed. 2d 72 (1975) [disclaimer of ownership and not present at time of search]; State v. Patterson, 252 So. 2d 398, 400 (Fla. App., 1971) [Jones not mentioned in opinion]; State v. Hamilton, 264 N.C. 277, 141 S.E. 2d 506, 512 (1965), cert. den. 384 U.S. 1020, 86 S. Ct. 1936, 16 L. Ed. 2d 1044 (1966), habeas corpus denied, 260 F. Supp. 632 (E.D.N.C., 1966), affirmed, 382 F. 2d 296 (4th Cir., 1967) [consent to search given by driver]; and Head v. State, 246 Miss. 203, 136 So. 2d 619 (1962), cert. den. 317 U.S. 910, 83 S. Ct. 251, 8 L. Ed. 2d 179 (1962) [apparently rejected on the basis of Jones in Hamburg v. State, 248 So. 2d 430, 431 (Miss. S. Ct., 1971)]. See also, the discussion in Grant, 46 Mississippi Law Journal 147, 163 (1975).

But, despite a divergence of opinion, Petitioners believe the principles announced by this Court in Jones and Brown should control here. It appears to be well established that, in the case of a fixed structure, one who was lawfully on the premises had standing to challenge a search thereof, e.g., United States v. Brown, 540 F. 2d 1048, 1056-1057 (10th Cir., 1976). And, there is no logical justification for a different rule as regard to standing when the premises searched happened to be an automobile. See Rios v. United States, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960); Cotton v. United States, 371 F. 2d 385, 391 (9th Cir., 1967); and People v. Feliciano, 70 Misc. 2d 83, 332 N.Y.S. 2d 830, 834 (1972). See also, Weeks, 6 Arizona Law Review 65, 73-74 (1964). Although the continuing validity of Jones had been subjected to some attacks in recent years, the principle of standing from legitimate presence on the searched premises has not been materially affected. See generally, Duncan v. State, 276 Md. 715, 351 A. 2d 144 (1976). In any event, whether Jones has been eroded is for this Court to say, cf. United States v. Alewelt, 532 F. 2d 1165, 1167 (7th Cir., 1976).

Moreover, all other considerations aside, Petitioners should be accorded standing simply because they were the true objects or targets of the search, cf. United States v. Jeffers, 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 2d 59 (1951). The obvious purpose of the police in stopping the car in which Petitioners were riding and in conducting the search, was to determine if the Petitioners were the two male robbers. This action, then, was in reality directed at them and not at their female companions, one of whom turned out to be the registered car owner. Accordingly, it is absurd to conclude that it was solely someone else's privacy which was violated here. To be sure, this most logical theory of standing has not been clearly recognized by this Court, and there is a sparcity of authority thereon, but see then Judge Stevens remarks in United States v. Lisk, 522 F. 2d 228, 232-233 (7th Cir., 1975)

where he made the following observation, referring to United States v. Jeffers:

> . . . Jeffers' standing to challenge the search as well as the seizure might have been sustained on three alternative theories. (1) As a regular invitee, even though he was not present at the time of the search, his interest in the premises was sufficient to make the search an invasion of his privacy as well as his aunts'; (2) the search was 'directed at' him in the sense that the police were looking for his narcotics; or (3) that his interest in the seized property gave him standing to challenge the search that led to the seizure as well as the seizure itself.
>
> In later cases the Supreme Court has cited *Jeffers* as though it was decided on the first theory, that the defendant's interest in the searched hotel room rather than in the seized property allowed him to challenge the search . . .
>
> The *Jeffers* opinion itself emphasizes the fact that the police entered the hotel room 'for the sole purpose of seizing respondent's narcotics.' Thus, the Court seemed to rely on the second theory - that the search was directed at Jeffers - as the basis for its holding in that case that the search and seizure were not 'isolable'. . . (emphasis added) 522 F. 2d at 232.

Then, in United States v. Potter, 419 F. Supp. 1151, 1156-1157 (N.D. Ill., 1976), Judge Decker questioned Justice Stevens' analysis although, as in Lisk, the validity of the so-called "directed at" theory did not have to be determined to resolve the case under review. But, Judge Decker's views notwithstanding, the Seventh Circuit United States Court of Appeals has recently persisted in its recognition of this theory in the Lisk case on rehearing following remand, wherein the per curiam opinion states:

> If the record has disclosed that the search of Hunt's car had been intentionally 'directed at' Lisk, the Fourth Amendment's protection might apply to Lisk. 522 F. 2d at 231, 232. Concern for the important values inherent in the Fourth Amendment require, in this respect, that the burden fall upon the Government to show the absence of a search intentionally directed at the accused. 559 F. 2d 1108, at 1111 (7th Cir., 1977).

See also, the comment on the Lisk case in Young, 64 Georgetown Law Journal 1187, 1193-1197 (1976). And, for other cases lending support to the "directed at" theory, see: United States v. Cobb, 432 F. 2d

716, 720 (4th Cir, 1970) and United States v. Fay, 344 F. 2d 625, 628-629 (2nd Cir., 1965).

In the case-at-bar, albeit in a slightly different context than in Lisk, the disputed search was "intentionally directed at" the Petitioners. Hence, this is a proper case for application of the "directed at" theory as a fourth, independent basis for standing.

The instant case, therefore, presents a twofold reason for this Honorable Court's attention; to settle a conflict of authority on a matter of fundamental constitutional right and to decide whether the "directed at" theory for standing is valid.

CONCLUSION

Wherefore, Petitioners respectfully request that a Writ of Certiorari issue to the Appellate Court of Illinois, Third District.

Respectfully submitted,

ROBERT AGOSTINELLI
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This Petition was prepared with
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Supreme Court, U. S.
FILED
MAY 3 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-5781

FRANK L. RAKAS AND LONNIE L. KING,
Petitioners,

—vs.—

PEOPLE OF THE STATE OF ILLINOIS,
Respondents.

ON WRIT OF CERTIORARI TO THE APPELLATE
COURT OF ILLINOIS, THIRD DISTRICT

PETITION FOR CERTIORARI FILED NOVEMBER 25, 1977
CERTIORARI GRANTED MARCH 20, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5781

FRANK L. RAKAS AND LONNIE L. KING,
Petitioners,

—*vs.*—

PEOPLE OF THE STATE OF ILLINOIS,
Respondents.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 4, 1975—Petitioner's arrested.

March 3, 1975—Preliminary hearing conducted in the Circuit Court of Kankakee County, Illinois.

March 21, 1975—Indictment returned by the Grand Jury of Kankakee County, Illinois charging Petitioners with armed robbery.

April 2, 1975—Petitioners arraigned and plead not guilty.

April 28, 1975—Motion to suppress evidence illegally seized filed by Petitioners.

May 1, 1975—Motion to suppress denied following hearing.

May 6, 1975—Jury trial commenced.

May 7, 1975—Jury returned guilty verdicts.

May 21, 1975—Motion for new trial denied.

June 17, 1975—Sentencing hearing conducted, Petitioner Rakas sentenced to a sixteen (16) to thirty (30) years term of imprisonment and petitioner King sentenced to an eight (8) to twenty-four (24) years term of imprisonment.

June 17, 1975—Notice of Appeal filed.

March 23, 1977—Opinion of the Appellate Court of Illinois, Third Judicial District.

April 13, 1977—Denial of Petition for Rehearing by the Appellate Court of Illinois, Third Judicial District.

September 30, 1977—Petition for Leave to Appeal denied by the Supreme Court of Illinois.

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

No. 75-CF-425

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFFS,

vs.

FRANK L. RAKAS, AND LONNIE L. KING, DEFENDANTS.

BILL OF INDICTMENT

Filed March 21, 1975

COUNT I

The Grand Jury charges:

That on the 4th day of February, 1975, in the County of Kankakee and State of Illinois, FRANK L. RAKAS, and LONNIE L. KING, Defendants, committed the offense of ARMED ROBBERY in that said Defendants did, while armed with a dangerous weapon, to-wit: a rifle, take property, to-wit: lawful money of the United States, from the presence of Sylvia Kranich, by threatening the imminent use of force, in violation of Section 18-2 of Chapter 38 of Illinois Revised Statutes.

COUNT II

The Grand Jury further charges:

That on the 4th day of February, 1975, in the County of Kankakee and State of Illinois, FRANK L. RAKAS, and LONNIE L. KING, Defendants, committed the offense of ARMED ROBBERY in that said Defendants did, while armed with a dangerous weapon, to-wit: a rifle, take property, to-wit: the ignition key for a 1973 Plymouth automobile from the presence of Billy Glenn Woods by threatening the imminent use of force, in violation of Section 18-2 of Chapter 38 of Illinois Revised Statutes.

COUNT III

The Grand Jury further charges:

That on the 4th day of February, 1975, in the County of Kankakee and State of Illinois, FRANK L. RAKAS, and LONNIE L. KING, Defendants, committed the offense of ARMED ROBBERY in that said Defendants did, while armed with a dangerous weapon, to-wit: a rifle, take property, to-wit: a 1973 Plymouth automobile from the presence of Billy Glenn Woods by threatening the imminent use of force, in violation of Section 18-2 of Chapter 38 of Illinois Revised Statutes.

A TRUE BILL

(signed) _____
Foreman

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

MOTION TO SUPPRESS EVIDENCE
ILLEGALLY SEIZED

Filed April 28, 1975

[Caption Omitted in Printing]

Now comes the Defendants, FRANK L. RAKAS and LONNIE L. KING, and pursuant to the Illinois Revised Statutes, Chapter 38, Section 114-12, moves this Honorable Court to suppress as evidence illegally seized from the Defendants' presence or person on or about February 4, 1975, the following items:

> A gun, ammunition, United States currency, clothing and any other thing obtained by unlawful search and seizure by Peace Officers of the State, County or local governmental units of Illinois; the search being of the person of the Defendants and of an automobile occupied by said Defendants.

This Motion is made on the grounds that the search and seizure of the aforementioned items without a warrant was illegal for the following reasons:

1. On or about February 4, 1975, at about the hour of 9:45 P.M., the Defendants, FRANK L. RAKAS and LONNIE L. KING were passengers in a motor vehicle, to-wit: an automobile driven by one Johnetta M. Clontz.
2. That on said date at about 9:45 P.M., the driver, Johnetta M. Clontz, of said vehicle, a 1970 purple Plymouth bearing Illinois 1974 license plate number RT 6237, was lawfully and peaceably operating said vehicle on a public highway, being in a Southerly direction on Illinois Route 50 approximately .1-.2 of a mile North of the Robert Hall Road in Kankakee County.

3. That at about the above time and place said automobile was stopped by Peace Officers of the State, County and local governmental units; neither the driver nor any of the occupants of said automobile were violating any Statute, law or ordinance regarding the operation of any motor vehicle in the State of Illinois.
4. That at the time and place said automobile was stopped by Peace Officers, said stopping was made without any probable cause to do so.
5. That all four occupants, including the Defendants, were ordered out of said automobile at gun point; that all four occupants complied, at which time said automobile was searched thoroughly, including the trunk, by Peace Officers.
6. That during the search of said automobile, certain evidence was found, to-wit: a gun, ammunition, United States currency, clothing, and other items; that the Defendants assert that said search and seizure was made without any search warrant or legal authority whatsoever.
7. That the aforementioned search was not made incident to a lawful arrest.
8. That no one, including the Defendants, gave permission or authority to any Peace Officer to search said automobile.
9. That none of the evidence seized at the time and place of said search, was in plain view of said Peace Officers.
10. That at the time of the aforesaid search and seizure, said Peace Officers had no warrant for the arrest of said Defendants nor for the search and seizure, and had no reasonable grounds for believing that the Defendants were committing or had committed an offense and had no reasonable grounds for searching the Defendants or said automobile occupied by said Defendants.
11. That the aforesaid search and seizure, in view of the facts stated above, was in violation of the rights of the Defendants and of the Fourth, Fifth and Fourteenth Amendments of the United States

Constitution and of the Constitution of Illinois, Article Two, Sections 2, 6 and 10 and of the Illinois Revised Statutes, Chapter 38, Article 107 and 108.

In support of this Motion, the Affidavit of Allen C. Kuester, is attached hereto, incorporated herein and filed herewith.

FRANK L. RAKAS AND
LONNIE L. KING,
Defendants,

By (signed) _____
ALLAN C. KUESTER,
Their Attorney

STATE OF ILLINOIS)
) ss
COUNTY OF KANKAKEE)

ALLEN C. KUESTER being first duly sworn deposes and says that he is the Attorney for the Defendants, FRANK L. RAKAS and LONNIE L. KING, in the above entitled cause; that he has read the foregoing Motion and has knowledge of the contents thereof, and that the same are true and correct to the best of his information, belief and knowledge.

(signed) _____
ALLAN C. KUESTER

[Jurat Omitted in Printing]

[Proof of Service Omitted in Printing]

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

HEARING ON MOTION TO SUPPRESS

Transcript of Proceedings

Conducted May 1, 1975

TESTIMONY OF FRANK L. RAKAS

DIRECT EXAMINATION

By Mr. Kuester [defense counsel]:

[R103] Q. Please state your name?
A. Frank L. Rakas.
[R104] Q. And where do you reside, sir?
A. Kankakee County Jail.
Q. How old are you?
A. Twenty-eight.
Q. Calling your attention to February 4, 1975 at about the hour of 9:45 p.m., do you recall where you were?
A. Yes, sir.
Q. And where were you?
A. I was driving down Route 50, passenger in the car, coming towards Kankakee down Route 50 from Manteno.
Q. Within Kankakee County?
A. Yes.
Q. How many people in the car with you?
A. Four.
Q. Did you know who the four were?
A. Yes.
Q. Who was the driver?
A. Miss Janette M. Clontz.
Q. Who was the front seat passenger?
A. Lonnie King.
Q. Where were you located?
A. Driver's side in the back seat.

Q. Who else?
A. Mary Ann Jackson.
Q. Where had you been coming from at that time?
A. R & W Lounge in Manteno.
Q. And on Route 50 what occurred at that time about 9:45 p.m.?
[R105] A. We was pulled over by approximately five squad cars and told to get out of the car.
Q. And at that time did you have any knowledge of whether anyone was violating any motor vehicle laws?
A. No, sir, I didn't.
Q. What happened at the time the car was pulled over?
A. We was removed from the car at gun-point and told to stand with our hands on top of the automobile. We was searched and the car was searched.
Q. Prior to the car being searched were all four of you removed from the vehicle?
A. Yes, sir.
Q. Where were you removed to?
A. The front lefthand fender.
Q. What about Lonnie King?
A. I believe he was on the right side front fender.
Q. What about the two women?
A. They was in front of the automobile but I don't believe they had put their hands on it.
Q. At the time you were removed what happened to you after you were removed?
A. Told me to place my hands on top of the car and spread my feet apart and was searched.
Q. Did you see the other three occupants also searched?
A. Yes, I did.
Q. Was anything removed from you at that time?
[R106] A. From my person?
Q. Yes.
A. No, sir.
Q. Did anybody say anything or tell you what they were doing?
A. No.

Q. What happened immediately after you and the others were searched?
A. They searched the automobile.
Q. Where did they search the automobile?
A. The whole automobile.
Q. The trunk area also?
A. I believe so. I believe the trunk was open.
Q. At the time they conducted the search of the car did anyone place you under arrest or say those words?
A. No sir.
Q. Then what happened next?
A. Handcuffed and put in the squad car and brought to the County Jail.
Q. Did anyone say anything to you at that time?
A. No, sir.
Q. Did anyone—yourself included—give anyone permission to search the vehicle that you know of?
A. No.
Q. Did you give permission?
A. No. I wasn't asked.
Q. Do you know whether or not any items were removed from the interior of that car?
[R107] A. Yes.
Q. Do you know what was removed? See it?
A. Yes.
Q. What was removed, if you know?
A. Sawed-off rifle and a box of shells.
Q. Did you see where these items were removed from the vehicle?
A. The shells were removed from the glove box and the rifle from underneath the seat.
Q. Was the glove box locked or unlocked at the time?
A. It was locked.
Q. Did anyone at any time say you were under arrest?
A. No, sir.
Q. Could you describe the car you were occupying at that time?
A. It was a 1970 purple Roadrunner. I am not positive about the model of the car.

Q. Did you know the license number of that car?
A. No, I didn't.
MR. KUESTER: That is all the questions I have.
THE COURT: Mr. Herzog.

CROSS-EXAMINATION

By Mr. Herzog [prosecutor]:

[R108] Q. Mr. Rakas, you said you were sitting in the back seat?
A. Yes.
Q. And the shells were taken from the glove box up in the front seat?
A. Yes.
Q. And the sawed-off rifle was taken out from underneath the front seat?
A. Yes.
Q. On the passenger side, isn't that right?
A. Yes.
Q. Whose car was that, sir?
A. Miss Clontz's.
Q. It wasn't yours, was it?
A. No.
Q. One other question. What color shirt were you wearing that night, sir?
A. Red.
Q. At that time?
A. Yes.
Q. All red, right?
A. Yes, sir. They have it here at the County Jail.
MR. HERZOG: Okay. No other questions.

REDIRECT EXAMINATION

By Mr. Kuester:

Q. In regard to—other than the red shirt—were you wearing pants?
[R109] A. Yes.
Q. What color were they?
A. Blue levis.
MR. KUESTER: That is all. Thank you, sir.

THE COURT: Call you next witness.
MR. KUESTER: I would like to call Lonnie L. King.

TESTIMONY OF LONNIE L. KING

DIRECT EXAMINATION

By Mr. Kuester:

Q. Please state your name.
A. Lonnie L. King.
Q. Where are you residing presently?
A. Kankakee County Jail.
Q. How old are you?
A. Thirty.
Q. Calling your attention to February 4, 1975 about the hour of 9:45 p.m., do you recall where you were?
A. I just left R & W Lounge In Manteno and was coming back to Kankakee.
Q. Were you in an automobile at that time?
A. Yes, I was.
Q. Who was with you at that time?
A. Mary Ann Jackson, Frank Rakas and Johnette Clontz.
Q. Were you driving or someone else?
A. Johnetta was driving and I was on the righthand side in the front.
[R110] Q. Do you recall where you were at 9:45 p.m.—what road or route?
A. I think Route 50—I am not sure.
Q. What happened at about that time?
A. Well, we were just driving along and the next thing I knew there was squad cars all around us and they had shotguns and I think there was a rifle pointed at us too.
Q. Then what happened? Was the car stopped?
A. Yes, they stopped it and pulled in front of it and alongside it.
Q. What happened when the car was stopped in regard to you?
A. They held the guns on us and told us to get out one at a time.

Q. Did you do so?
A. Yes, we did.
Q. Did everybody get out of the car?
A. Yes.
Q. When you got out of the car what happened?
A. I was placed on the righthand side fender and told to keep my hands on the car and was searched and Frank was made to get on the lefthand side and the two girls were in front.
Q. Did anyone say anything to you why you were stopped and searched?
A. No, sir.
Q. Did you see any activity in the car after you were stopped regarding police officers?
A. Yes, sir, I did.
[R111] A. Two officers going through the front of the car, looking through the glove box, up under the seats, and they just made a thorough search. I saw at least one of the officers open the glove box and then they come to the trunk and was going through the stuff.
Q. Did anyone of you in your hearing give anyone permission to search that vehicle or any part of it?
A. Nobody even asked permission.
Q. Did anyone show you or produce a search warrant or arrest warrant?
A. No, sir.
Q. What happened after the vehicle was searched?
A. My handcuffs were placed on me and I was put in a squad car where I sat with the other occupants and we were brought to the Kankakee County Jail.
Q. Did anyone tell you why you were brought there?
A. No, sir.
MR. KUESTER: That is all. Thank you.
THE COURT: Mr. Herzog.

CROSS-EXAMINATION

By Mr. Herzog

Q. What color color shirt were you wearing?
A. Light blue.

Q. What kind of car were you driving?
A. I wasn't driving the car.
Q. What kind of car was it you were riding in?
A. 1970 Plymouth Roadrunner—purple.
[R112] Q. Whose car was it?
A. Janette Clontz—I went with her when she bought it.
Q. Her name is Jeannette Clontz, is that right?
A. Yes.
Q. And there were four people in that car, isn't that right?
A. Yes.
MR. HERZOG: No further questions.

(Witness excused)

THE COURT: Call your next witness.
MR. KUESTER: I would like to call Donald Sollers to the stand.

TESTIMONY OF DONALD SOLLERS

DIRECT EXAMINATION

By Mr. Kuester

Q. Would you please state your name and occupation?
A. Donald Sollers, Manteno City Police Department, County of Kankakee.
Q. Calling your attention to February 4, 1975, sometime around the hour of 9:00 P.M., do you recall where you were?
A. Yes, on routine patrol in the Village of Manteno.
Q. Any particular location?
A. I believe, sir, I was on Route 50 at that time.
[R113] Q. Did you have occasion to go to or be in the vicinity of the R & W Lounge or Restaurant or whatever it is called?
A. Yes, sir.
Q. About what time were you there?
A. I believe it was a little before 9:00. I don't remember exactly what time it was.

Q. Did you have occasion to see that vehicle at that time?
A. Yes, sir, I did.
Q. Do you recall that vehicle in particular?
A. A purple Plymouth Roadrunner.
Q. Do you recall the license number?
A. I believe the license on that car was RT-6237.
Q. Illinois '74 plates?
A. Yes.
Q. How many people did you see in or about that vehicle?
A. Four people getting out of the vehicle—two white males and two white females, sir.
Q. Did you watch that car at that time?
A. Yes, sir, I did.
Q. And what did you do after watching it?
A. I had called the Sheriff's Office to obtain a better description of the people that was supposedly involved in the armed robbery at Robert Hall's and he said he didn't have too much at that time and for me to give him what I had.
Q. Can I back up just a moment?
A. Yes.
[R114] Q. Prior to seeing this particular purple Roadrunner had you had any prior information? Any radio information?
A. Yes, sir, I had.
Q. Who from?
A. From the dispatcher at the Sheriff's Office.
Q. Briefly what type of radio transmission did you receive?
A. A transmission that there was an armed robbery at Robert Hall Clothing Store, Route 50, and the people —two white males—had left in a blue Plymouth Roadrunner—the direction of travel was unknown at that time. The license was SA numbers unknown.
Q. Did you get any further description at that time as to the description of this blue Plymouth Roadrunner other than what you have told us?
A. Yes—white racing stripe down the side and damage to the right front I believe he said.

Q. Did they give the year of that car?
A. I believe it was a 1970.
Q. Did you have that in your report anyplace as to what year it was?
A. Yes, sir.
Q. Do you have that report with you today?
A. No, sir, I don't.
Q. But when you say 1970 are you sure it was a 1970 or is that what you think it was?
A. Yes, sir, 1970.
[R115] Q. You are sure.
A. 1970 blue Plymouth Roadrunner.
Q. You had a description of two white males, correct?
A. Yes.
Q. What was the description given as to those?
A. Dark pants and one wearing a blue shirt and dark jacket. This is all I got in the first description put out.
Q. White male. Any height?
A. I believe around 6 feet—160-170 pounds.
Q. After that radio transmission then you saw this vehicle around the R & W with four people coming out of it, correct?
A. Yes.
Q. What did you do after you saw those four people?
A. I went to the telephone and called the Sheriff's Office to try to get a better description of the people involved.
Q. Did they give you any further description?
A. No, sir, not at that time.
Q. What did you do then?
A. He asked for the description of the people in the car I had observed and I gave it to him.
Q. You related the information back to him by radio?
A. No, I was talking on the telephone.
Q. Who did you talk to?
[R116] A. The dispatcher at the Sheriff's Office.
Q. And you told them what the four people you had observed looked like?
A. Correct.

Q. Did you get any communication back from him?
A. Yes, the subject in the blue shirt did match the description of one of the suspects.
Q. And what did you do then?
A. He, the dispatcher, told me to stay with the car and watch it and they would send the Sheriff's car up there to talk to the people and check.
Q. What description did you give to the dispatcher of the four people you had observed?
A. The two subjects—the male was wearing white shoes and I believe levis, dark jacket. The other subject had a blue shirt, pullover type shirt, zipper type.
Q. When you got that information back were the persons still in the car—the four people?
A. No, sir, they were inside the R & W Restaurant.
Q. Did you do anything to stop or apprehend them at that time?
A. No.
Q. You waited until they got into the car?
[R117] A. As I waited for the Sheriff's car, the subjects came out and got in their car and proceeded southbound on Route 50.
Q. What did you do next?
A. I contacted the Sheriff's Office they had left the R & W and they advised me to continue following the car.
Q. Did you proceed to a point where everybody stopped the car?
A. Yes, we went south from Manteno on Route 50 and as they approached St. George Road the State Police and the County Police were there and they said they would stop the car and they radioed to let the car pass St. George Road and continue back to the Robert Hall Clothing Store.
Q. Did you participate in stopping the vehicle?
A. Yes.
Q. Did you help get the four people out of the car?
A. Yes.
Q. When you talked originally did you tell the dispatcher there were females also?
A. Yes, sir.

Q. Did you give a description of those females?
A. No, I don't believe I did. I don't believe he asked for a description of the females.
Q. When the vehicle was stopped did all four people get out of the car?
A. Yes, sir, they did.
[R118] Q. Was this at gunpoint?
A. Yes, sir.
Q. Did you participate in searching any of the persons?
A. Just patted them down as they got out of the vehicle.
Q. Did anybody say that they were under arrest to anyone?
A. When we got them out of the car?
Q. Yes.
A. No, sir. Not that I recall.
Q. As they were getting ut—after they were out of the car, did anyone do anything to the interior of the car at all?
A. Deputy Kuntz entered the car from the driver's side and started searching the car.
Q. All four occupants were out at this time?
A. Yes.
Q. Towards the front or back?
A. I believe all in front of the car.
Q. Was it a two-door or four-door car?
A. I believe two-door.
Q. And did you participate in looking in the car or searching the interior?
A. No, sir, I did not.
Q. Did you see anybody remove anything from the inside of the car?
A. Yes.
Q. What did you see?
A. Deputy Kuntz removed shells from the glove box and Lieutenant Ponton from the Sheriff's Office removed a .30 caliber [R119] sawed-off rifle from the driver's area of the vehicle—the front part of the vehicle.

Q. Now, after these items were removed, do you know what happened next?
A. At that time Captain Farthing was there and he ordered them taken to the County Jail and told me to bring one of them in to the County Jail, which I did. Other Officers took the others.
Q. Did you hear anyone ask permisison to search that car?
A. No, sir, I didn't.
Q. To your knowledge were any of the items taken from the interior of the car, the gun and shells, visible from outside the car when you came there to the scene?
A. Not that I saw, sir, no.
Q. You mentioned they had coats?
A. Yes, sir.
Q. The two males you saw?
A. Yes, sir.
Q. Were they coats or were they sweaters?
A. They appeared—I just seen them as I passed behind the car and they appeared to be dark-colored jackets.
Q. Did you get hold of them?
A. No, sir.
Q. Are you sure they were jackets as opposed to being sweaters?
A. No, sir. They appeared to be jackets.
[R120] THE COURT: They could have been sweaters?
A. Yes, sir, possibly.
Q. What footgear were they wearing?
A. They both had white shoes on.
Q. Had you had any description of shoes?
A. No, sir.
MR. KUESTER: That is all I have.

CROSS-EXAMINATION

By Mr. Herzog:

Q. Officer Sollers, about what time was it you first got the report from the Sheriff's Office?
A. Around 8:25.
Q. How about 8:45?
A. Yes, sir, in this area.

Q. Where were you when you first got the call?
A. On Route 50 at Manteno.
Q. Where is Robert Hall's at?
A. Approximately four and a half miles south on Route 50.
Q. Also on Route 50?
A. Yes, sir.
Q. What did you do when you first got the report?
A. I drove down to the south edge of Manteno—the Ruder Equipment Company, and pulled in and sat.
Q. You were looking for a vehicle?
A. A blue Roadrunner with white racing stripe, yes.
Q. This was daytime or nighttime?
A. Nighttime.
[R121] Q. Did you see a vehicle coming north on Route 50?
A. Yes.
Q. This was a purple Roadrunner was it?
A. Yes.
Q. Still nighttime?
A. Yes.
Q. How soon was that after you got the original report of the armed robbery at Robert Hall's?
A. I believe possibly ten minutes or so.
Q. What did you do when you saw that?
A. Followed it.
Q. Where to?
A. To the R & W Lounge in Manteno.
Q. And at the R & W you saw these people getting out of that vehicle?
A. Yes.
Q. That is when you called the Sheriff's Department?
A. Yes.
Q. This is when—Did you see any action with this other automobile after you went back to your vehicle?
A. Yes.
MR. KUESTER: Object. What automobile?
MR. HERZOG: The Roadrunner. The one you were following?
A. The purple Roadrunner.

Q. Did you see them come back to that car?
A. Yes.
[R122] Q. How long were they there at R & W?
A. I would say probably forty minutes maybe.
Q. After they got back to the vehicle what did they do?
A. Proceeded southbound on 50.
Q. What did you do?
A. I followed the car.
THE COURT: Officer, this description you got from the Sheriff's Office, did it match the description of this Roadrunner you were following?
A. The color was different. They had given out a blue 1970 Plymouth Roadrunner and the one I followed was purple—a Roadrunner.
Q. How about the stripe?
A. No, sir.
THE COURT: How about the license number?
A. When I got in behind the car the license was SA—and the numbers unknown, and in behind the purple Roadrunner it was RT6237.
Q. Did you ever get any other license number?
A. No, sir.
Q. Were you able to look on both sides of the vehicle for damage or racing stripe or was there damage?
A. When I first saw it I could only see the driver's side which would be the left side of the vehicle.
Q. And as you followed south on Route 50 did you notice anything unusual about the manner of driving?
[R123] A. They were driving quite slowly on Route 50 for a four-lane highway.
Q. About how slowly?
A. Twenty miles per hour at times we were down to.
Q. And the route they were taking would take them past Robert Hall's?
A. Yes.
Q. In fact, they were stopped very close to Robert Hall's?
A. Yes. Maybe fifty years [sic-yards] north of Robert Hall's on Route 50.
MR. HERZOG: No further questions.

REDIRECT EXAMINATION

By Mr. Kuester:

Q. What side of the car was this damage supposed to be on the dispatcher gave out?

A. They had given the damage out as being the right front, I believe.

Q. Now, when you say quite slowly, about twenty miles per hour at one point when you were following it?

A. Yes.

Q. Was this when the other squads were nearby?

A. No.

Q. Is there a minimum speed law on Route 50?

A. It is not posted.

Q. But the maximum is fifty-five?

A. Yes.

Q. But there is no minimum?

A. Not posted.

[R124] Q. Was it a foggy evening?

A. No.

Q. It wasn't? Was it clear?

A. Yes, sir.

MR. KUESTER: That is all I have.

RECROSS EXAMINATION

By Mr. Herzog:

Q. You told the Judge that you had read the rear license plate number?

A. Pardon me?

Q. You told the Judge you had read the rear license plate?

A. Yes.

Q. At that time did you know what the front license plate was?

A. No.

RE-REDIRECT EXAMINATION

By Mr. Kuester:

Q. At the R & W did you have occasion to see both license plates?

A. I drove around the car but I didn't notice the front.

Q. But it was such that you could have seen the plate if you wanted to look at it?

A. Yes.

Q. But you don't recall looking at it? Is that right?

A. Yes.

[R125] Q. Did you see any damage on the car?

A. No, sir.

Q. (Mr. Kuester) Did you see any white stripes on it?

A. No, sir.

THE COURT: Call you next witness. (witness excused)

MR. KUESTER: That is all the Defendants' evidence we have.

THE COURT: Mr. Herzog?

ARGUMENT ON PROSECUTOR'S ORAL MOTION TO DISMISS THE MOTION TO SUPPRESS AND THE TRIAL COURT'S RULING

MR. HERZOG: We move to dismiss on the basis of *Alderman* vs. *United States*, 394 U.S. 165. The Supreme Court says that as to the Fourth Amendment, there is no standing to contest its validity under these circumstances. It has to be the one whose rights are violated —the aggrieved party—by the introduction of damaging evidence. It wasn't their car. It wasn't their shells. It wasn't their rifle. I think the only one that has standing would be Johnette Clontz and she isn't here.

MR. KUESTER: She isn't charged in this at this time. And I don't think they have to admit these are their items. I think they do have a standing which they have shown.

THE COURT: What is the case?

MR. KUESTER: I don't have a case available, but just because you are not the owner of the car doesn't mean you can't be aggrieved by them trying to admit something against you in a court of law.

THE COURT: The only point here is exactly what counsel said. The case cited says exactly what he says it says. It says that Defendants like these have no standing to contest the validity of the search. It wasn't their car. They had no control over it and [R126] you don't have any case that says the contrary.

MR. KUESTER: I would like to tender a case.

THE COURT: There isn't any case that says contrary.

MR. KUESTER: I believe there are and I could locate some I believe. The whole standing area has been broadened and we are talking about the search of an automobile, the occupants and the fact you don't own it doesn't mean you can't be aggrieved and this stuff can't be used against you.

THE COURT: Well, I believe the law says what counsel says it says. These men have no standing to contest the validity of the search. It wasn't their car. They had no control over it. The only person that could complain would be the one who was driving it at the time or who owned the car.

Motion to Suppress is denied.

Defendants remanded to custody.

CIRCUIT COURT RECORD

No. 96 May 1, 1975

COURT OPENED PURSUANT TO ADJOURNMENT:

PRESENT: THE VICTOR N. CARDOSI, *Judge*

EDWARD P. DROLET, *State's Attorney*

LARRY HILDEBRAND, *Sheriff*

ROGER SERAFINI, *Clerk*

75-CF-425

PEOPLE OF THE STATE OF ILLINOIS

vs

FRANK L. RAKAS, LONNIE L. KING

ARMED ROBBERY

Now on this day, case called. Defendants present in their own proper person in custody of the Sheriff of Kankakee County with their attorney, Allan Kuester, Public Defender for Kankakee County. People represented by William Herzog, Assistant State's Attorney. Hearing called on Motion to Suppress Evidence. Witnesses sworn. Evidence heard. Motion to Suppress denied. Defendants remanded to the custody of the Sheriff of Kankakee County in default of bond. (CARDOSI)

IN THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D. 1977

No. 75-286

THE PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF-APPELLEE,

vs.

FRANK L. RAKAS, LONNIE L. KING,
DEFENDANTS-APPELLANTS.

Appeal from the Circuit Court of
Kankakee County, Illinois

Honorable Patrick M. Burns, Presiding Judge.

OPINION—Filed March 23, 1977

MR. JUSTICE BARRY delivered the opinion of the court.

This is an appeal from the armed robbery convictions of Frank L. Rakas and Lonnie L. King following a jury trial in the Circuit Court of Kankakee County. Defendant Rakas was sentenced to sixteen (16) to thirty (30) years imprisonment and defendant King was sentenced to a term of imprisonment of eight (8) to twenty-four (24) years.

The incident which formed the basis of the multi-count indictment charged armed robbery against each defendant was an evening robbery of the Robert Hall clothing store in Bourbonnais, Illinois, on February 4, 1975. One count charged the defendants with taking property from the cashier of the store, another with taking the ignition key to the car of Billy Glenn Woods, a stock-boy, at the store, and a final count with taking the automobile belonging to Woods. Defendants contend that the court erred in entering judgments of conviction upon all three armed robbery offenses because they claim the charges

arose from a single course of conduct. The State concedes that under the authority of *People* v. *Whittington* (1970), 46 Ill. 2d 405, 265 N.E.2d 679, the trial court should not have entered judgments of conviction on both the counts charging defendants with armed robbery of the ignition key and the automobile belonging to Woods, (Counts II and III of the indictment). Both of those charges did arise out of the same conduct and in time and motivation were not separate and distinct offenses. Of those two only the judgment of conviction on the armed robbery of Woods' automobile (Count III) should stand. The judgment of conviction of armed robbery of the cashier at the Robert Hall store was a separate distinct offense from the armed robbery of the automobile. Although the other two robberies coincided in time they were of two separate persons and with a separate distinct motivation for each. We find no error in entering judgments of convictions based on those two charges of armed robbery. (*People* v. *Grady* (4th Dist., 1976), —— Ill. App. 3d ——, 357 N.E.2d 230). Several Illinois cases have found that a criminal defendant can be convicted and sentenced for more than one armed robbery when property is taken simultaneously from more than one victim. (*People* v. *Butler* (1976), —— Ill. 2d ——, 356 N.E.2d 330; *People* v. *Prim* (1972), 53 Ill. 2d 63, 289 N.E.2d 601; *People* v. *Perry* (5th Dist., 1976), 38 Ill. App. 3d 517, 347 N.E.2d 869). We agree.

Of the other issues raised by defendants several can be summarily decided. Firstly, defendants argue that the trial court erred in denying their motion to suppress evidence seized during an unlawful search of an automobile not belonging to neither of the defendants but in which they were riding as passengers of a girl friend. We conclude, as the trial court did, that the defendants lacked standing to complain of the allegedly unlawful search and seizure. Several recent Illinois cases have well established that without a proprietary or other similar interest in an automobile, a mere passenger therein lacks standing to challenge the legality of the search of the vehicle. (See, *People* v. *French* (1965), 33 Ill. 2d 118, 210 N.E.2d 540, (car searched belonged to defendant's friend

and owner did not consent to the search); *People* v. *Pohlmann* (4th Dist., 1973), 13 Ill. App. 3d 779, 300 N.E.2d 302, (where defendant not owner and not present at time of search); *People* v. *Almerdo* (1st Dist., 1976), 39 Ill. App. 3d 197, 350 N.E.2d 191, (where car was stolen); *People* v. *Washington* (2nd Dist., 1976), —— Ill. App. 3d ——, 354 N.E.2d 501, (where car belonged to defendant's girlfriend); *People* v. *Glanton* (1st Dist., 1975), 33 Ill. App. 3d 124, 338 N.E.2d 30, (where defendant not owner, not present, and had no control over garage searched; and *People* v. *Haflin* (2nd Dist., 1976), 40 Ill. App. 3d 635, 351 N.E.2d 594, (search of defendant's car; brother of defendant controlling and consenting)). We believe that defendants failed to establish any prejudice to their own constitutional rights because they were not persons aggrieved by the unlawful search and seizure. The search and seizure was not directed against the defendants and they were not victims of it. They wrongly seek to establish prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else and fail to prove an invasion of their own privacy. (*Alderman* v. *United States* (1969), 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176).

Defendants also contend that the evidence failed to prove beyond a reasonable doubt that defendants were the perpetrators of the armed robbery charged. The thrust of their argument is based on the occurrence witnesses' inability to see the masked robbers' features, and that only Bill Woods could identify the rifle recovered as the one used in the robbery. The defendants also claim that the fact the denominations and amount of money found on defendants and their female companions were similar to the amount taken in the robbery was not incriminating, and that the lack of other circumstantial evidence because of the failure to find any masks or other clothes allegedly used in the robbery on defendants' persons or discarded along the highway eliminated the possibility of guilt beyond a reasonable doubt. We have viewed the record and are convinced that the identification testimony of the occurrence witnesses and the other circumstantial evidence was not doubtful or conflicting and supports the jury's guilty verdicts. It is not the duty of a reviewing court to substitute its judgment as to the weight of disputed evidence or the credibility of witnesses for the jury. That function is for the trier of fact who heard the evidence presented and observed the demeanor of the witnesses. (*People* v. *Novotny* (1969), 41 Ill. 2d 401, 244 N.E.2d 182). The evidence here was not so improbable or so unsatisfactory as to raise a reasonable doubt of guilt.

Defendants present the issue of whether they were unfairly prejudiced by allegedly improper closing argument of the prosecutor. The prosecutor, over the objection of defendants' counsel, argued in closing that the defendants retained the rifle, instead of discarding it like the clothing allegedly used in the robbery, because it was valuable, and defendants could "use it in other armed robberies". The prosecutor made those remarks in response to the defendants' counsel injecting the subject matter during closing argument. We believe that the defense counsel provoked a part of the State's improper argument. The defendants have not persuaded us that the comment although improper, would have caused the jury to reach a different verdict had the comment not been made. The error, here, did not contribute to defendant's conviction and was clearly harmless error. (*Harrington* v. *California* (1969), 395 U.S. 250, 89 S. Ct. 19726, 23 L. Ed 2d 284; *Chapman* v. *California* (1967), 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed 2d 705; *People* v. *Mostert* (3rd Dist, 1976), 34 Ill. App. 3d 767, 340 N.E. 2d 300). Defendants also find error with the prosecutor's comment that the evidence indicated that one of the robbers had a southern accent. Defendants' contention is that the comment was an improper comment upon facts not in the record. From an examination of the record it appears that although testimony concerning one of the robbers having a southern accent "like southern Illinois" was objected to by the defense, only the portion referring to southern Illinois was sustained and stricken.

The testimony concerning a southern accent generally was not stricken and no further objection was made. The argument is without merit as the prosecutor may comment upon facts preserved in the record.

The final claim of error is that the trial court erred in refusing to give Illinois Pattern Jury Instruction—Criminal No. 3.02 in its entirety. The State tendered and the court gave the first paragraph of IPI-Criminal No. 3.02. The court refused however to give the second paragraph, which provides:

> "You should not find the defendant guilty unless the facts and circumstances proved exclude every reasonable theory of innocence."

The committee comments to the Pattern Jury Instructions state that the second paragraph to IPI-Criminal No. 3.02 should be given only when the proof of guilt is *entirely* circumstantial. Defendants argue that the proof of guilt in the instant case was entirely circumstantial. Without an extended discussion of the dichotomy between direct and circumstantial evidence, we believe there was some direct evidence in the form of the gun found with defendants and identified by a prosecution witness as the one used in the robbery. Because there was some direct evidence the court was correct in refusing to give the second paragraph of IPI-Criminal No. 3.02. (*People* v. *Minish* (3rd Dist, 1974), 19 Ill. App. 3d 603, 312 N.E.2d 49; *People* v. *Bolton* (3rd Dist, 1976, 35 Ill. App. 3d 965, 343 N.E.2d 190; *People* v. *Fletcher* (3rd Dist, 1976), —— Ill. App. 3d ——, 352 N.E.2d 10).

Accordingly the judgments of conviction of defendants on Count II of the indictment are reversed, while the judgments of conviction and sentences imposed on the other counts of the indictment are affirmed in all respects.

Reversed in part and affirmed in part.

STENGEL, P.J. and SCOTT, J., concur.

IN THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

ORDER DENYING REHEARING

Be it Remembered, That, to wit: On the 13th day of April, 1977 certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

75-286

PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

vs.

FRANK L. RAKAS AND LONNIE L. KING, APPELLANTS

Appeal from Kankakee County

75-CF-425

Hon. Patrick M. Burns

Now on this day this cause coming on for hearing upon the petition for a rehearing filed herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that said petition for a rehearing herein, be and the same hereby is overruled and denied and that said petitioner pay the costs and charges herein taxed.

NOTIFICATION OF DENIAL OF PETITION FOR LEAVE TO APPEAL BY SUPREME COURT OF ILLINOIS

STATE OF ILLINOIS
OFFICE OF CLERK OF THE SUPREME COURT
SPRINGFIELD 62706

September 30, 1977

State Appellate Defender
Third Judicial District
628 Columbus Street
Suite 308
Ottawa, Illinois 61350

No. 49468—People State of Illinois, respondent, vs. Frank L. Rakas, et al., petitioners. Leave to appeal, Appellate Court, Third District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell C. Woods
Clerk of the Supreme Court

SUPREME COURT OF THE UNITED STATES

No. 77-5781

FRANK L. RAKAS AND LONNIE L. KING, PETITIONERS

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO the Appellate Court, Third District Court of the State of Illinois.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 20, 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 264194 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5781

FRANK L. RAKAS and LONNIE L. KING,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5781

FRANK L. RAKAS and LONNIE L. KING,

Petitioners,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, affirming petitioners' convictions, is reported at 46 Ill. App. 3d 569, 4 Ill. Dec. 877, 360 N.E. 2d 1252 (3d Dist. 1977). A copy of this opinion, as well as copies of the unreported order of the Appellate Court denying petitioners' Petition for Rehearing, and the unreported order of the Supreme Court of Illinois, denying petitioners' Petition for Leave to Appeal have been previously submitted to this Court as appendices to the Petition for Writ of Certiorari and, therefore, are not contained in this Brief in Opposition. (Petition for Writ of Certiorari, Appendices A, B and C)

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondents do not believe that the petitioners have shown any reason for this Court to exercise its sound judicial discretion to grant their Petition for Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

Whether a passenger in an automobile owned and operated by a third party has standing to object to a search and seizure directed against the third party.

STATEMENT OF THE CASE

The petitioners, Frank L. Rakas and Lonnie L. King, were indicted by a Kankakee County, Illinois, Grand Jury on three counts of Armed Robbery (R.C. 4-5) and were found guilty, following a jury trial, of all three charges. (R. 343).[1] The incident giving rise to the multi-count indictment was an evening armed robbery of a Robert Hall clothing store located on Illinois Route 50 in Bourbannais, Illinois.

The general descriptions given at trial by the witnesses (and in particular, witness Billy Woods), while possibly capable of fitting the physical description of many men, also fit the petitioners' physical characteristics. Both robbers were male Caucasians as are the petitioners. One robber was approximately 6'1" and weighed between 185 and 195 pounds, while the other robber was approximately 5'11" and weighed between 175 and 185 pounds. (R. 165). Petitioner Rakas is 6'2" and weighs 200 pounds, while Petitioner King is 6' and weighs 165 pounds. (R.C. 22-23). According to witness Woods, the eyebrows of the taller robber were light brown or dark blond. (R. 166). Petitioner Rakas' hair color is blond. (R.C. 23). Woods stated that one robber had a "southern accent." (R. 169). Petitioner King was born and raised in Griffin, Georgia. (R. C. 22; Pre-Sentence Investigation Report at 2). Finally, Woods estimated the robbers' ages to be between twenty-eight (28)

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1. References are made to the Record on Appeal in the following manner:

"R.C." refers to the common law record (*i.e.* pleadings, motions, etc.);

"R." refers to the verbatim transcripts.

and thirty-three (33). (R. 181). Petitioner Rakas was 27 years, 11 months, at the time of the offense, while Petitioner King was 30 years old. (R.C. 22-23).

Moreover, witness Woods positively identified the 30-30 lever action, sawed-off rifle, which was recovered in the car in which the petitioners were riding, as being the same 30-30 level action, sawed-off rifle used in the armed robbery. (R. 168). Woods was familiar with that type of rifle since his father owned a 30-30 lever action rifle. (R. 167). Furthermore, he indicated that the unusual characteristics of the rifle in question made it quite identifiable. (R. 168-169).

The rifle, along with other items of evidence (ammunition, currency,[2] clothing, and "any other thing obtained by unlawful search"[3]), was included in a pre-trial defense Motion to Suppress. (R.C. 50). At the hearing on this Motion, the defense offered the testimony of the petitioners and one Donald Sollers, a Manteno, Illinois policeman.

The petitioners testified that, at 9:45 p.m. on February 4, 1975, they were riding along Illinois Route 50 in a 1970 purple Plymouth Roadrunner owned by one Janette Clontz,

---

2. At trial, the store manager related that $162.00 was stolen from the cash register during the armed robbery. (R. 141). He stated that there were over 50 one-dollar bills, a few tens, a lot of fives and no twenties in the register at that time. (R. 141). Officer Deschand testified that the petitioners and their two female companions had the following money on their persons when booked: Rakas: 21 one-dollar bills; King: 18 five-dollar bills, 1 ten and 2 ones; Clontz: 18 one-dollar bills; and Jackson: 17 one-dollar bills [an overall total of 58 ones, 18 fives and 1 ten equaling $158. (R. 237).] (Since the petitioners stopped at a bar before being arrested, the total of $158 was quite reasonable.)

3. A walkie-talkie and a C.B. radio, both of which operated on the same frequency, were also discovered under the car's dash board (People's Exhibits 13 and 14). (R. 224-226).

who was driving. (R. 104, 107, 111-112). King was in the right front seat, and Rakas was in the rear driver's-side seat with another woman, Mary Ann Jackson. (R. 104, 109).[4] As they were proceeding from the R & W Lounge in Manteno, Illinois, a number of police cars pulled them over, ordered all of the occupants out of the car at gun point, and searched both their persons and inside the vehicle. (R. 105-106, 110). No permission for the search was given to, or requested by, the police. (R. 106, 111). Police officers removed a box of shells (People's Exhibit 2) from the car's glove box and the sawed-off rifle (People's Exhibit 1) from underneath the right front seat. (R. 107).

Officer Sollers testified that at about 8:45 p.m., while he was patrolling 4½ miles north of the Robert Hall store, he received a radio report of an armed robbery. He was advised to be on the lookout for two men in a 1970 blue Plymouth Roadrunner (*i.e.* victim Woods' car), bearing a license number beginning with "SA," and having a white racing stripe and a damaged right front. (R. 114, 120, 123). Ten (10) to fifteen (15) minutes after receiving this report, Officer Sollers spotted a purple Roadrunner containing two males and two females. The car bore license number "RT6237," no racing stripe, and no apparent damage; nevertheless, he (Sollers) followed it northbound on Route 50 to the R & W Lounge in Manteno, Illinois. (R. 113-114, 121-122, 124-125).[5] Sollers watched the four people enter the lounge. He then called the sheriff's office for a better description of the robbery suspects. He told the dispatcher

---

4. The two women, Clontz and Jackson, were initially accused in connection with the armed robbery, but were subsequently discharged at the preliminary hearing. (R. 97).

5. The car belonging to Billy Woods was subsequently found abandoned on Route 50, about a mile and a half north of the clothing store.

that one of the two men entering the lounge was wearing white shoes, Levi's, and a dark jacket while the other man had on a blue shirt. The dispatcher replied that the man in the blue shirt matched the description of one of the robbers.[6] While Sollers then waited for a sheriff's car, the subjects left the lounge after about 40 minutes, and he (Sollers) again followed their car, this time southbound on Route 50 back toward the Robert Hall store. (R. 117, 123). The car was eventually stopped some fifty (50) to one hundred (100) yards north of the store; the occupants removed at gun point, and a search conducted. (R. 117-118, 123). State Trooper Kurtz took shells from the glove box, and Lieutenant Ponton of the Kankakee County Sheriff's Department found the rifle. (R. 118-119). Sollers did not hear anyone ask permission to search the car, and to his knowledge, none of the items seized were visible from outside

---

6. This clothing description varied somewhat from the clothing descriptions of the robbers given at trial. However, the absence of an identical clothing match is easily explained. Officer Sollers stated that the interval between the time he first heard the radio dispatch and the time he first saw the petitioners was between ten (10) and fifteen (15) minutes. (R. 192). Allowing five minutes for the time needed to get the dispatch on the air, Sollers first saw the petitioners some fifteen (15) to twenty (20) minutes after the armed robbery took place. When he first observed them, their car was on Route 50 approximately 4 to 4½ miles north of the Robert Hall store. (R. 120, 191-192, 207-208). Route 50 has a maximum speed limit of 55 m.p.h. (R. 123, 196). Thus, the petitioners had at least ten (10) to fifteen (15) minutes to abandon the first getaway car, change clothing and discard their first set of clothes. The fact that the clothing was never found is not implausible given the vast area in which it could have been hidden.

the car. (R. 119). Prior to the stop, the car was being driven slowly [twenty (20) m.p.h. in a fifty-five(55) m.p.h. zone]. (R. 123).

Following this testimony, the State orally moved to dismiss the Motion to Suppress on the ground that the petitioners were without standing to contest the validity of the police search of a car in which they were passengers but did not own. (R. 125). The Court agreed with the State's assertion and denied the Motion to Suppress. (R. 125-126).

This decision was subsequently upheld by the Illinois Appellate Court, Third Judicial District. *People* v. *Rakas and King*, 46 Ill. App. 3d 569, 4 Ill. Dec. 877, 360 N.E. 2d 1252, 1253-1254 (3d Dist. 1977). (Petition for Writ of Certiorari, Appendix A). A Petition for Rehearing was denied on April 13, 1977. (Petition for Writ of Certiorari, Appendix B). The Illinois Supreme Court denied a Petition for Leave to Appeal on September 30, 1977. (Petition for Writ of Certiorari, Appendix C).

REASONS FOR DENYING THE WRIT OF CERTIORARI PREFATORY STATEMENT

At the outset, it should be noted that the petitioners have failed to show the need for this Court, in the exercise of its sound judicial discretion, to grant their Petition. Rule 19(1), *United States Supreme Court Rules,* 28 U.S.C.A. In particular, they have failed to show that the Illinois courts have "decided a federal question of substance not theretofore determined by this court, or [have] decided it in a way probably not in accord with the applicable decisions of this court." Rule 19(1)(a), *United States Supreme Court Rules,* 28 U.S.C.A. Keeping this admonition in mind, let us turn to the merits of the petitioners' arguments.

I.

A PASSENGER IN AN AUTOMOBILE OWNED AND OPERATED BY A THIRD PARTY DOES NOT HAVE STANDING TO OBJECT TO A SEARCH AND SEIZURE DIRECTED AGAINST THE THIRD PARTY.

Petitioners, relying upon the cases of *Jones* v. *United States,* 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960) and *Brown* v. *United States,* 411 U.S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973), urge that they had standing to question the validity of a search of an automobile in which they were riding in as passengers. The automobile was owned and operated by a third party.[7]

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7. The ALR annotation for the *Jones* case [78 ALR 2d 233 (1960)] specifically excluded automobiles from the scope of the annotation. 78 ALR 2d at 249, fn. 7.

On the other hand, the State, in the trial and appellate court, relied upon this Court's decision in *Alderman* v. *United States,* 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969), wherein it was stated:

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing. 89 S. Ct. at 965. *See also Goldstein* v. *United States,* 316 U.S. 114, 62 S. Ct. 1000, 86 L. Ed. 1312 (1942) and *Wong Sun* v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 419, 9 L. Ed. 2d 441 (1963).

This Court concluded that, as a general rule, "... Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." 89 S. Ct. at 966-967.

Indeed, even *Jones* v. *United States, supra,* states:

> In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.
>
> • • •
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. 80 S. Ct. at 731.

As noted by petitioner, the question which he raises has provoked decisions opposing, as well as supporting, his position.[8] In Illinois, the Illinois Supreme Court has held that:

> . . . one challenging the legality of a search as a basis for suppressing evidence must allege and establish that he, himself, was the victim of an invasion of privacy and cannot claim prejudice through the use of evidence gathered as a consequence of a search and seizure directed at another. (Citing to *Alderman* v. *United States, supra*) *People* v. *Black,* 52 Ill. 2d 544, 288 N.E. 2d 376, 382 (1972).

Furthermore, in *People* v. *McNeil,* 53 Ill. 2d 187, 290 N.E. 2d 602, 605 (1972), the Illinois Supreme Court stated:

> . . . we adhere to the rule requiring a defendant to establish the manner in which *his* constitutional rights have been violated before permitting him to challenge the validity of a search and seizure. (Emphasis added).

In the instant case, the petitioners neither claimed, nor actually had, a possessory or property interest in the automobile which was searched. Nor did they allege and establish that *they* were the victims of an invasion of privacy.

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8. Petition for Writ of Certiorari at 6, fn. 2 and 3. In addition to the decisions noted in the Petition, the following cases have also considered this issue: *Moss* v. *State,* 344 N.E. 2d 859, 864 (Ind. Ct. App. 1976) and *Kirkland* v. *State,* 232 N.E. 2d 365, 366 (Ind. 1968) [the foregoing opinions appear to reject the analysis contained in *Paxton* v. *State,* 263 N.E. 2d 636, 642 (Ind. 1970) cited in support of petitioner's position in their Petition for Writ of Certiorari at 6, fn. 2] ; *State* v. *McDaris,* 463 S.W. 2d 813, 817-818 (Mo. 1971) ; *Petition of Gallagher,* 150 Mont. 476, 436 P. 2d 530, 533 (1968) ; *State* v. *Torres,* 81 N.M. 521, 469 P. 2d 166, 171-172 (N.M. Ct. App. 1970), *cert. denied,* 81 N.M. 506, 469 P 2d 151 (1970) ; *United States* v. *Humphrey,* 409 F. 2d 1055, 1058 (10th Cir. 1969) ; All of the above cases support the State's position that petitioners did not have standing.

Indeed, the vehicle was being driven by the car's owner, Janette Clontz. As noted by the Appellate Court, the search was directed against Ms. Clontz and not the petitioners. They were not the "victims" of the search. *People* v. *Rakas and King,* 46 Ill. App. 3d 569, 4 Ill. Dec. 877, 360 N.E. 2d 1252, 1254 (3d Dist. 1977). It is therefore submitted that the Illinois courts have not "decided a federal question of substance . . . in a way probably not in accord with applicable decisions of this court." Rule 19(1)(a), *United States Supreme Court Rules,* 28 U.S.C.A.[9]

II.

EVEN IF PETITIONERS DID HAVE STANDING TO OBJECT, THEY FAILED TO MEET THEIR BURDEN OF PROOF AT THE SUPPRESSION HEARING.

Even if the petitioner's Motion to Suppress were considered on its merits, it would still have been denied since the petitioners failed to meet their burden of proof at the suppression hearing. *Ill. Rev. Stat.,* 1975, ch. 38, § 114-12(b).

In Illinois, a defendant is required to make a prima facie case that the police lacked probably cause to stop him and conduct a search. *cf. People* v. *Normant,* 25 Ill. App. 3d 536, 323 N.E. 2d 553, 558 (1st Dist. 1975). In the instant

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9. The search having been "directed at" Ms. Clontz, it becomes unnecessary to discuss petitioners' second reason for granting their Petition for Writ of Certiorari; to wit, the need for the adoption of the "directed at" theory as an independent basis for standing. Petition for Writ of Certiorari at 7-9. In any event, the theory advanced by petitioners has not been adopted by this Court and, in view of the above-stated facts, there is no reason for this Court to use the instant case as the vehicle to promulgate a new independent basis for standing.

case, Officer Sollers testified that he received a radio transmission stating that the Robert Hall Store had been robbed. A description of the two robbers was given to him, which description stated that the robbers both had dark pants and one was wearing a blue shirt and dark jacket. (R. 115).[10] Officer Sollers also received a description of the getaway car (*i.e.* Woods' automobile). He saw a somewhat similar type of car approach him some ten minutes later coming from the direction of the Robert Hall store. (R. 121). He followed this vehicle to the R & W Lounge in Manteno and watched as four people exited the car and entered the lounge. (R. 113, 115). Sollers proceeded to call the Sheriff's office by telephone in order to get a better description of the armed robbers. (R. 115). The Sheriff's dispatcher asked Sollers for his description of the people in the car. (R. 115). Sollers related that one male was wearing white shoes, Levi's and a dark jacket. The other subject had on a blue pullover shirt. (R. 116). The dispatcher told Sollers that the subject wearing the blue shirt matched the description which they had received. (R. 116). Sollers was told to "stay with the car and watch it" until another Sheriff's car could reach the scene. (R. 116).

Apparently before the second car could arrive, the four individuals exited the lounge and re-entered their vehicle. (R. 116). Sollers was advised to continue to follow the vehicle. (R. 117). The vehicle proceeded south on Route 50 at an extremely slow rate of speed (20 m.p.h. in a 55 m.p.h. zone). (R. 123). The suspects' route was taking them back past the scene of the crime, so the police waited until they reached the immediate area; then they blocked the road, stopped the car and conducted the search which led to the seizure of the sawed-off rifle and ammunition. (R. 117-119).

---

10. See fn. 6, *supra*

It is clear that the blue shirt of one suspect matched the preliminary description of the robbers which had been given to the police. This match is what prompted the Sheriff's office to have Officer Sollers keep the subjects under surveillance. Moreover, the subjects drove back toward the scene of the crime at an extremely slow rate of speed as if they were quite fearful of being stopped for a traffic offense by the police car which was following them. These two facts were clearly enough to give Sollers and the other officers probable cause to stop and search the vehicle and its occupants. It is therefore respectfully submitted that the defendants failed to prove a prima facie case of lack of probable cause and thus their suppression motion could have been denied on that basis.

Finally, in view of the other evidence which points to the petitioners' guilt (see Statement of the Case, *supra*), it is respectfully submitted that the petitioners' convictions could be upheld even if the evidence which was the subject of the Motion to Suppress had, in fact, been excluded.

CONCLUSION

For the foregoing reasons, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-5781

ORIGINAL COPY

FRANK RAKAS AND LONNIE KING, PETITIONERS

-vs-

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT

REPLY BRIEF FOR THE PETITIONERS

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COUNSEL FOR PETITIONERS

ARGUMENT

The Petitioners, in electing to file this reply brief, do so for the purpose of answering the second point in the Brief in Opposition filed by the Respondent (at pages 11-13). This point of Respondent was not anticipated in the original Petition for a Writ of Certiorari because it was assumed for the purposes of the Petition that the search of the automobile in which Petitioners were riding as passengers was unlawful (Petition, at page 4). Therefore, this reply will not repeat any argument previously made.

WHETHER OR NOT PETITIONERS PRESENTED A PRIMA FACIE CASE ON THE MERITS FOR SUPPRESSION OF EVIDENCE SEIZED BY POLICE DURING THE CONTESTED SEARCH IS NOT RELEVANT TO THE ISSUE BEFORE THIS COURT BECAUSE NO STATE COURT HAS YET RULED UPON THE LEGALITY OF THE SEARCH.

Obviously, Petitioners believe that their challenge to the warrantless police search of the automobile in which they were riding as passengers was meritorious, just as they believe that their presence at the time of the search was sufficient to confer standing. However, Petitioners do not see how the ultimate question as to the legality of the search has any relevance at this point because, unfortunately, the state courts declined to rule upon that question due to the view taken regarding Petitioners' standing. In effect, Petitioners are seeking an order by this Court which would require the state courts to decide the merits of Petitioners' challenge to the search. Of course, such a decision might be on the basis of either the United States Constitution or state law. Respondent, on the other hand, is now also seeking a decision on the merits, except it is asking this Court to make the determination as the reason for denial of the instant Petition for Writ of Certiorari. Suffice it to say, this Court need not address an issue which was not first decided by a lower court; and, indeed, it should not do so if state law as well as the federal constitution can be applied, c.f. Dorszynski v. United States, 418 U.S. 424, 94 S. Ct. 3042, 41 L. Ed. 2d 855 (1974) and California v. Krivda, 409 U.S. 33, 93 S. Ct. 32, 34 L. Ed. 2d 45 (1972).

Petitioners wish to make it quite clear that the only issue decided thus far by the state courts was the question of Petitioners' standing. First, the trial court suggested no other grounds for denial of Petitioner's Motion to Suppress when it erroneously ruled as follows:

> "THE COURT: Well, I believe the law says what counsel (prosecutor) says it says. These men (Petitioners) have nostanding to contest the validity of the search. It wasn't their car. They had no control over it. The only person that could complain would be the one who was driving it at the time or who owned the car. Motion to Suppress is denied." (A53)

Next, the Appellate Court of Illinois, although requested in Petitioners' brief to render a decision on the merits, adopted the limited reasoning of the trial court with this ruling:

> "Of the other issues raised by defendants several can be summarily decided. Firstly, defendants argue that the trial court erred in denying their motion to suppress evidence seized during an unlawful search of an automobile not belonging to either of the defendants but in which they were riding as passengers of a girlfriend. We conclude, as the trial court did, that the defendants lacked standing to complain of the allegedly unlawful search and seizure. "360 N.E. 2d 1252-1253(Appendix A of Petition).

Lastly, the Illinois Supreme Court refused to review this case without a statement of reasons (See Appendix C of Petition).

CONCLUSION

Under the circumstances, then, the second point in Respondent's Brief in Opposition is not only legally unsound, it is also unfair. The Respondent, having successfully obtained favorable decisions from the state courts predicated upon the narrow issue of Petitioners' standing, is now attempting to broaden the scope of the case before this Court because it appears advantageous for the Respondent to do so. To be sure, Petitioners are likewise desirous of a broader resolution, but they are aware that this must be done by state courts in the first instance.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5781

FRANK L. RAKAS and LONNIE L. KING,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondents.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

BRIEF FOR PETITIONERS

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IN THE

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, is reported at 46 Ill. App. 3d 569, 360 N.E.2d 1252 (1977) and is reproduced in the Appendix (hereinafter "A") at pages A. 26-30. Also appearing in the Appendix at A. 31 is the unreported order of the Appellate Court of Illinois, Third Judicial District, denying the petition for rehearing. The order of the Illinois Supreme Court denying leave to appeal is likewise unreported and appears at A. 32.

JURISDICTION

The order of the Illinois Supreme Court denying leave to appeal was entered on September 30, 1977 (A. 32). The Petition for a Writ of Certiorari was timely filed on November 25, 1977, and it was granted on March 20, 1978. The jurisdiction of this court rests on 28 U.S.C. §1357(3).

QUESTIONS PRESENTED

1. Whether passengers who were legitimately present in an automobile when it was stopped by police have standing to challenge the constitutionality of a warrantless search of that automobile.
2. Whether persons against whom a search is directed have a basis for standing to contest the search which is independent of the other recognized criteria for establishment of such standing.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the legal protection of the law.

STATEMENT

The Petitioners, Frank L. Rakas and Lonnie L. King, were convicted of armed robbery in the Circuit Court of Kankakee County, Illinois. The most significant evidence against them was a sawed-off rifle (People's Exhibit 1) identified by one of the robbery victims as being the same weapon used by the masked robbers (R168).[1]

This rifle was the subject of a Motion to Suppress filed by Petitioners prior to trial wherein it was asserted that the evidence had been illegally seized by police during a search of an automobile in which the Petitioners were, at that time, riding as passengers (A. 4-7). During the pre-trial hearing on the motion, the Petitioners and Police Officer Donald Sollers testified as defense witnesses.

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[1]The prefix "R" denotes a page from the transcript of the record of trial that has not been reproduced in the Appendix. Also, used herein is the prefix "RC" which refers to the portions of the common law record (*i.e.*, pleadings, motions, etc.) which have not been reproduced in the Appendix. References to the Appendix are made with the prefix "A".

Officer Sollers testified that, while on patrol, he spotted a purple Plymouth Roadrunner, occupied by two males and two females, which he thought might be the blue Roadrunner used as a getaway car by the two unknown male robbers (A. 15). The car he saw, however, had a different license number from that of the getaway car and lacked other described characteristics (A. 21). Nevertheless, he followed the car to a lounge where the four occupants — the Petitioners and their female companions — went inside for about forty minutes (A. 20-21). Sollers then telephoned the Sheriff's dispatcher and was told that one of the males, dressed in a blue shirt, matched the limited description given of one of the robbers (A. 17). [Testimony during the trial-in-chief established that the robbers wore ski masks (R165-166). Moreover, the clothing worn by the Petitioners when arrested (R195) did not match that described at trial as having been worn by the robbers (R163, 165-166, 172-173); nor did the preliminary police reports included in the record on appeal suggest that the police were looking for men dressed as were the Petitioners (RC18-21).]

After the Petitioners left the lounge and were again proceeding on the highway, an assembly of policemen stopped the car in which they were riding and ordered the occupants out at gunpoint (A. 17-18). The ensuing search of the automobile disclosed the rifle (A. 18). Before the search, none of the occupants were placed under arrest (A. 18), permission to conduct the search was not sought (A. 19), and the seized evidence was not visible from outside the car (A. 19).

The driver of the automobile was one of the Petitioners' female companions, Johnette M. Clontz (A. 8). The Petitioners both agreed on cross-examination that Ms. Clontz

was also the owner of the automobile in which they were riding as passengers (A. 11,14). Consequently, the prosecutor made an oral motion to dismiss Petitioners' Motion to Suppress on the ground that, since it was not their car, they had no standing to contest the validity of the search, and the matter was resolved adversely to the defense with the following brief discussion:

> "MR. HERZOG [Prosecutor]: We move to dismiss on the basis of *Alderman vs. United States,* 394 U.S. 165. The Supreme Court says that as to the Fourth Amendment, there is no standing to contest its validity under these circumstances. It has to be the one whose rights are violated — the aggrieved party — by the introduction of damaging evidence. It wasn't their [Petitioners'] car. It wasn't their shells. It wasn't their rifle. I think the only one that has standing would be Janette [sic] Clontz [owner] and she isn't here.
>
> MR. KUESTER [Defense counsel]: She isn't charged in this at this time. And I don't think they have to admit these are their items. I think they do have a standing which they have shown.
>
> THE COURT: What is the case?
>
> MR. KUESTER: I don't have a case available, but just because you are not the owner of the car doesn't mean you can't be aggrieved by them trying to admit something against you in a Court of law.
>
> THE COURT: The only point here is exactly what counsel said. The case cited says exactly what he says it said. It says that Defendants like these have no standing to contest the validity of the search. It wasn't their car. They had no control over it and you don't have any case that says the contrary.
>
> MR. KUESTER: I would like to tender a case.
>
> THE COURT: There isn't any case that says contrary.

MR. KUESTER: I believe there are and I could locate some I believe. The whole standing area has been broadened and we are talking about the search of an automobile, the occupants, and the fact you don't own it doesn't mean you can't be aggrieved and this stuff can't be used against you.

THE COURT: Well, I believe the law says what counsel says it says. These men have no standing to contest the validity of the search. It wasn't their car. They have no control over it. The only person that could complain would be the one who was driving it at the time or who owned the car.

Motion to Suppress is denied.

Defendants remanded to custody." (A. 23-24).

On appeal, the Appellate Court of Illinois disposed of Petitioners' contentions in this manner:

> Of the other issues raised by defendants several can be summarily decided. Firstly, defendants argue that the trial court erred in denying their motion to suppress evidence seized during an unlawful search of an automobile not belonging to either of the defendants but in which they were riding as passengers of a girlfriend. We conclude, as the trial court did, that the defendants lacked standing to complain of the allegedly unlawful search and seizure. 46 Ill. App. 3d 569, 571, 360 N.E.2d 1252, 1253 (3rd Dist., 1977). (A. 27).

Finally, the denial of leave to appeal by the Illinois Supreme Court was made without comment.[2]

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[2]The trial court's rationale, affirmed by the Illinois reviewing courts, was predicated upon the belief that legal ownership or possession of the automobile was the deciding factor in the denial of standing to Petitioners. Additional evidence on the question of standing, therefore, was not deemed necessary. So, as a result, it was not revealed at the suppression hearing that the owner, Ms. Clontz, was actually the

(continued)

SUMMARY OF ARGUMENT

I.

The "legitimately on the premises" rule formulated by this Court in *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed.2d 697, 78 A.L.R. 2d 233 (1960) furnishes a sufficient ground for the Petitioners' standing to challenge the legality of the search of the automobile in which they were passengers. Petitioners had a reasonable expectation of privacy by virtue of their presence in the automobile at the time of the search, and there is no logical reason not to apply the *Jones* rationale to an automobile search.

II.

The fact that the search was intentionally directed at the Petitioners furnishes another compelling ground for their standing. This ground, termed the "directed-at theory", finds support as an independent basis for standing in the decisions of this Court, although this Court has not expressly so held. Moreover, the directed-at theory, of all grounds for standing, is the most consistent with the

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(footnote continued from preceding page)

former wife of Lonnie King. However, contained in the common law record of this case is a transcript of the police interrogation of Ms. Clontz wherein she stated that King's true name was Douglas Woodrow Clontz and that she had been married to him for four or five years (RC37). The presentence report also indicates that Johnette Clontz is King's former wife (RC115). This relationship between King and Clontz explains the statement made by King during the suppression hearing that he was with Ms. Clontz when she bought the car (A. 14).

purpose of the exclusionary rule in that it provides the maximum deterrent to unlawful police conduct.

ARGUMENT

I.

A PASSENGER LEGITIMATELY IN AN AUTOMOBILE, BY VIRTUE OF HIS PRESENCE, HAS STANDING TO CHALLENGE THE LEGALITY OF A POLICE SEARCH OF THAT AUTOMOBILE.

A. Introduction.

The central issue in this case is whether the Petitioners, who are legitimately riding in an automobile owned by someone else, have standing to object to a warrantless police search of that automobile. This Court is not asked to determine the validity of the search since the rulings by the state courts were limited to the narrow question of standing and the legality of the search has yet to be addressed by a lower court. The relief sought, then, is an order requiring the state court to decide the ultimate question of whether the search was lawful.

The Petitioners believe they have standing to raise this question because of their legitimate presence in the automobile at the time of the search. Standing will not be claimed on the basis of any proprietary or possessory interests in the automobile, nor do the Petitioners rely upon "automatic" standing arising from the nature of the charges against them.

B. A person legitimately on non-public premises has a reasonable expectation of privacy with regards thereto and, therefore, has standing to challenge a search of those premises.

This Court has recognized that "the principal object of the Fourth Amendment is the protection of privacy rather than property." *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L.Ed.2d 782, 790 (1967). *See also, Katz v. United States*, 389 U.S. 347, 350-352, 88 S. Ct. 507, 19 L.Ed.2d 576, 581-582 (1967). Accordingly, it is appropriate in determining whether one has standing to challenge the legality of a search to evaluate the reasonableness of his expectation of privacy which he asserts was violated. *See Combs v. United States*, 408 U.S. 224, 227, 92 S. Ct. 2284, 28 L.Ed.2d 308, 311 (1972). In making such an evaluation, though, property interests are of secondary importance.

Since this Court's opinion in *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed.2d 697, 78 A.L.R. 2d 233 (1960), standing to challenge the legality of a search need no longer depend solely upon often subtle property-law distinctions. In *Jones*, this Court ruled that one seeking to contest a search need not first claim proprietary or possessory interests in either the property seized or the premises searched. With regard to previously relied upon distinctions such as "lessee," "licensee," "invitee," and "guest," it was clearly stated:

> *A fortiori* we ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime. No just interest of the Government in the effective and

> rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. 362 U.S. 257, 267, 80 S. Ct. 724, 734, 4 L.Ed.2d 697, 706.

This Court's rejection of standing tests based upon property-law concepts was reaffirmed in *Brown v. United States*, 411 U.S. 223, 229, 36 L.Ed.2d 208, 214, 93 S. Ct. 1565 (1973) wherein it was noted the present test is that a defendant would have standing where either (a) he was on the premises at the time of the contested search, (b) he alleges a proprietary or possessory interest in the premises, or (c) he is charged with an offense which includes, as an essential element of the offense charged, possession of the seized evidence at the time of the search and seizure.

The principle underlying the three indicia of standing noted in *Brown v. United States*, 411 U.S. 223, 229, 93 S. Ct. 1565, 1569, 36 L.Ed.2d 208, 214 (1973) is expectation of privacy. Focusing particularly upon the first indicium listed in *Brown*, the formulation of the general rule that one legitimately on the premises searched has standing is a practical recognition that such an individual has a reasonable expectation of privacy. And, with regard to such an expectation, for the purpose of standing there is no legal distinction between the property owner and a guest who is present at the time of the police intrusion. Of course, the owner's expectation of privacy normally continues even in his absence, whereas the guest may lose his expectation when he departs the premises. *But see, United States v. Jeffers*, 342 U.S. 48, 72 S. Ct. 93, 96 L.Ed.2d 59 (1951).

In any event, where the non-owner was present on the premises, as in the instant case, property-law concepts are without significance.[3]

C. There is no logical difference, with respect to standing, between a person legitimately present in a fixed structure and one in an automobile.

To be sure, there are Fourth Amendment distinctions between automobiles and homes or offices. This Court has said that, generally, one has a diminished expectation of privacy in a motor vehicle, *e.g., United States v. Chadwick*, 433 U.S. 1, 12, 97 S. Ct. 2476, 2484, 53 L.Ed.2d 538, 549 (1977) and *South Dakota v. Opperman*, 428 U.S. 364, 367-369, 96 S. Ct. 3092, 3095-3097, 49 L.Ed.2d 1000, 1004-1005 (1976). However, it has been clearly stated: "A search, even of an automobile, is a substantial invasion of privacy." *United States v. Ortiz*, 422 U.S. 891, 95 S. Ct. 2585, 2588, 45 L.Ed.2d 623, 629 (1975). Moreover, differences between mobile vehicles and buildings have been drawn, not to resolve questions of standing, but to explain the need for less stringent requirements in

[3]Petitioners are mindful of Mr. Justice Black's dissent in *Mancusi v. DeForte*, 392 U.S. 364, 375-776, 88 S. Ct. 2120, 2127-2128, 20 L.Ed.2d 1154, 1164 (1968) wherein he suggests that there may be exceptions to the legitimately-on-the-premises rule if circumstances are such that there is no reasonable expectation of privacy. This possibility is not discussed, however, because any exceptions to the rule would have to be isolated, as in the case of Mr. Justice Black's example of a janitor; and, surely, the Petitioners' situation as passengers in a car traveling on the highway is not at all comparable to that of a mere janitor in a large office building.

warrantless searches of vehicles. Hence, Fourth Amendment protections most certainly do apply to private areas within automobiles, *e.g.*, *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 88 S. Ct. 1472, 20 L.Ed.2d 538 (1968) and *Rios v. United States*, 364 U.S. 253, 80 S. Ct. 1431, 4 L.Ed.2d 1688 (1960).[4]

Thus, a person legitimately in an automobile does have a reasonable expectation of privacy from unconstitutional governmental intrusion. Accordingly, such a person would have standing to question the legality of governmental intrusions, and, under the rationale of *Jones*, it is immaterial whether the person is the owner of the car or a passenger. Since, in *Jones*, the differentiation between the privacy expectations of owner and guest was considered insignificant for purposes of standing, the issue of standing cannot

[4]The *Dyke* case is particularly interesting because the factual situation therein appears quite close to that at bar. In *Dyke*, like here, a search disclosed a rifle under the seat of a car, and, also as in the instant case, this finding was used as evidence against passengers in the automobile. Unfortunately, the standing of those passengers to contest the search was not discussed in *Dyke*.

The *Rios* case is similarly noteworthy because it involved the search of a taxicab, and the evidence thus obtained led to the conviction of a passenger in the taxicab. Although the *Rios* opinion only briefly mentioned standing, it was obviously assumed that this passenger could properly contest the search.

It might also be noted that all of the occupants of an automobile which is stopped on the highway and searched by police would have their "right of free passage" violated. In *Carroll v. United States*, 267 U.S. 132, 154, 45 S. Ct. 280, 285, 69 L.Ed. 543, 552 (1925), it was stated:

> ". . . those lawfully within the country, entitled to use the public highways, have a right of free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

be decided here on the basis of such a differentiation without resurrecting the property-law-based standing test laid to rest by *Jones*. Such a resurrection would inevitably give rise to a plethora of litigation and would revive a standing test not consistent with the Fourth Amendment interest sought to be protected.

Indeed, most courts which have been called upon to decide this issue have had no difficulty applying the legitimately-on-the-premises rule to automobile passengers in the same manner as it has been applied to persons challenging the legality of searches of fixed structures.[5] On the other hand, those courts that have reached the opposite result did so without compelling logic and have simply reverted to discarded property-law concepts.[6]

Therefore, the Petitioners are not seeking an extension of the legitimately-on-the-premises rule to automobiles but

[5]*See, United States v. Holmes*, 521 F.2d 859, 867 (5th Cir. 1975), affirmed in relevant part on rehearing *en banc*, 537 F.2d 227 (5th Cir. 1976); *Bustamonte v. Schneckloth*, 448 F.2d 699, 700 fn. 1 (9th Cir. 1971), reversed on other grounds, 412 U.S. 218, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Peisner*, 311 F.2d 94, 105, 5 A.L.R. 3d 1196, 1211 (4th Cir. 1963); *Mullins v. State*, 35 Md. App. 605, 371 A.2d 713, 716 (1977); *State v. Bresolin*, 13 Wash. App. 386, 534 P.2d 1394, 1402 (1975); *Wing v. State*, 490 P.2d 1376 (Okla. Cr. 1971); and *Paxton v. State*, 263 N.E.2d 636, 642 (Ind. St. Ct. 1970). *See also, United States v. Tusseli*, 441 F. Supp. 1092, 1102 (M.D. Penn. 1977); *State v. Gaines*, 40 Ohio App. 2d 244, 318 N.E.2d 857, 861 (1974); *Hodges v. State*, 267 So.2d 798, 802 (Ala. 1972); *State v. Osborn*, 200 N.W.2d 798, 803-806 (Iowa S. Ct. 1972); *People v. Marshall*, 25 Mich. App. 376, 181 N.W.2d 578, 580 (1970); and *People v. Smith*, 35 Misc. 2d 533, 230 N.Y.S.2d 894, 900 (1962).

[6]*E.g., State v. Heath*, 222 Kan. 50, 563 P.2d 418, 420 (1977); *State v. Patterson*, 252 So.2d 398, 400 (Fla. App. 1971); and *State v. Perkins*, 543 S.W.2d 805, 807-808 (Mo. App. 1976). [But see, *State v. Hatten*, 561 S.W.2d 706, 712 (Mo. App. 1978).]

merely a recognition that the rule has already been properly applied to automobiles. Such an application is fully in accord with the decisions of this Court and with the vast majority of lower court opinions; and Petitioners are justified in asserting that the Illinois courts erred by denying them standing.

II.

AS THE "TARGETS" OF THE POLICE SEARCH, PETITIONERS HAVE STANDING TO OBJECT TO THE LEGALITY OF THE SEARCH.

While the legitimately-on-the-premises rule is sufficient to accord the Petitioners' standing to object to the search in this case, there is another compelling ground for their standing arising from the fact that they were the "objects" or "targets" of the instant police action. Standing can also be conferred upon them through application of what has been termed by various legal commentators as the "target doctrine" or the "directed at theory."[7]

Obviously, Petitioners Rakas and King were the actual targets of the police search. The police investigation was

[7] *E.g.*, Young, "Defendant Whose Property is Seized from Custody of Third Party has Standing to Challenge the Seizure But Not the Search", 64 Georgetown Law Journal 1187, 1193-1195 (1976); Grant, "Standing to Contest Illegal Searches and Seizures", 46 Mississippi Law Journal 147-168 (1975); Gutterman, "A Person Aggrieved: Standing to Suppress Illegally Seized Evidence in Transition", 23 Emory Law Journal 111, 134 (1974); White and Greenspan, "Standing to Object to Search and Seizure", 118 University of Pennsylvania Law Review 333, 349-356.

aimed at the apprehension of the two men who robbed the Robert Hall store; and, since there was no reason prior to the search to suspect the involvement of other people, particularly women, the police intrusion was clearly directed solely at the Petitioners. That the police were not concerned with the Petitioners' female companions, one of whom was the owner of the search automobile, was made quite clear in the testimony of Officer Donald Sollers, the policeman who spotted the suspected automobile after the robbery. According to Sollers, when he telephoned his observations to the Sheriff's Office, he did not give descriptions of the two women he saw in the automobile, nor was he asked for their descriptions (A. 18). Consequently, the search of the automobile owned by Johnette Clontz must unquestionably be viewed as having been directed at Rakas and King, not at Ms. Clontz or the other woman passenger.

Although the directed-at theory, which affords the Petitioners a second ground for standing on the facts at bar, has not expressly been held by this Court to be an independent basis for standing, the following rationale does appear in *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed.2d 697 (1960):

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. (emphasis added). 362 U.S. at 261, 80 S. Ct. at 730-731, 4 L.Ed.2d at 702.

Furthermore, this Court in *Bumper v. North Carolina*, 391 U.S. 543, 548 [footnote 11], 88 S. Ct. 1788, 1791, 20

L.Ed.2d 797, 802 (1968) noted that the language from *Jones* emphasized above supplied an alternative basis for standing for the petitioner therein. Therefore, advocates of the directed-at theory have concluded that the *Jones* language does lend support to the theory. *See,* Mr. Justice Fortas' separate opinion in *Alderman v. United States*, 394 U.S. 165, 207-209, 89 S. Ct. 961, 985, 22 L.Ed.2d 176, 206-207 (1969); *United States v. Cobb*, 432 F.2d 716, 719-720 (4th Cir. 1970); *United States v. Rosenberg*, 416 F.2d 680, 682 (7th Cir. 1969) and *State v. Hink*, 6 Wash. App. 374, 492 P.2d 1053 (1972).

More recently, this Court's decision in *United States v. Jeffers*, 342 U.S. 48, 72 S. Ct. 93, 96 L.Ed.2d 69 (1951) has likewise been suggested as supportive of the directed-at theory. In *Jeffers*, the defendant was held to have standing to contest the search of his aunt's hotel room where narcotics were found and seized. Commenting on the theory, then Judge Stevens noted in *United States v. Lisk*, 422 F.2d 228, 232-233 (7th Cir. 1975) (on petition for rehearing), *cert. den.*, 423 U.S. 1078, 96 S. Ct. 865, 47 L.Ed.2d 89 (1976) that standing in *Jeffers* might have been sustained on several alternative theories, including the directed-at theory, although he noted that, in later cases, this Court has cited *Jeffers* as if it had been decided on one of the other theories. *See also*, the recent opinion in the *Lisk* case, on rehearing following remand, at 559 F.2d 1108 (7th Cir. 1977) and *United States v. Alewelt*, 532 F.2d 1165, 1167 (7th Cir. 1976).

While case law support for the directed-at theory may not be plentiful, the theory has been endorsed by legal commentators (See footnote 8), and it is unquestionably that theory of standing which is most consistent with the

purpose of the exclusionary rule, *i.e.*, to deter unlawful police conduct. Indeed, it provides the maximum deterrent effect because the police are made aware that evidence illegally obtained by them may be excluded on motion of the person who was the target of their unlawful intrusion, notwithstanding considerations which limit other standing theories, such as property interests or whether the movant was on the searched premises. Furthermore, the directed-at theory would also deter police illegality that violates the privacy of individuals who probably would not themselves be in a position to complain of that illegality because not arrested.

It is, therefore, submitted that, even if it is not enough to base the Petitioners' standing to challenge this search simply upon their presence in the automobile, such standing must still be accorded because the search was also intentionally directed at the Petitioners.

CONCLUSION

For the reasons stated, the state court's erroneous judgment, that Petitioners lacked standing, should be reversed and the case remanded for a determination as to the legality of the search which the Petitioners sought to challenge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5781

FRANK L. RAKAS and LONNIE L. KING,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

BRIEF FOR RESPONDENTS

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ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether the "legitimately on the premises" theory of "automatic" standing confers upon passengers in an automobile the right to challenge a disputed search and seizure where they are charged with a non-possessory offense.

2. Whether there is compelling reason for this Court to extend the exclusionary rule to confer standing to challenge a disputed search and seizure on one who merely claims the search to have been "directed at" him.

SUMMARY OF ARGUMENT

I.

The "legitimately on the premises" theory of the "automatic" standing doctrine formulated in *Jones* v. *United States,* 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960) does not confer standing upon petitioners who seek suppression of evidence admitted at their trial. That theory of standing has no application to non-possessory offenses. If such a theory ever had such application it was abandoned by this Court in *Brown* v. *United States,* 411 U.S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973).

II.

The "directed at" theory of standing has never been recognized by this Court. It should not now be adopted. There are no compelling public policy considerations to warrant such a radical departure from the well established rule that only those whose rights were violated by the search itself have standing to urge a Fourth Amendment violation. To adopt such a theory would expand the exclusionary rule so that *anyone* against whom illegally seized evidence *might* be used could object. Furthermore, the search of the automobile was not directed against petitioners.

ARGUMENT

I.

THE "LEGITIMATELY ON THE PREMISES" THEORY OF STANDING IS ABROGATED IN NON-POSSESSORY OFFENSES.

In formulating the doctrine of "automatic" standing in *Jones* v. *United States,* 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), this Court was concerned with the two-pronged dilemma of prosecutorial self-contradiction and self-incrimination in a setting where possession of the seized evidence at the time of the disputed search and seizure was an essential element of the offense charged. To resolve this conflict, this Court held that the possession, on the basis of which the defendant there was convicted, sufficed to give him standing under Rule 41(e), Fed. R. Cr. Pr. The Court thus recognized that the same possession which both convicts and confers standing eliminates the conventional requirements of alleging an interest in the premises searched or the property seized. The opinion continued on, by way of dicta, to observe, as a second theory, that even if the offense was non-possessory, a "requisite interest in the premises" basis for standing was satisfied by testimony that the petitioner, who had a key thereto, was legitimately present in the apartment where the search was conducted.

The language in *Jones, supra,* to the effect that:

> No just interest of the government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. (362 U.S. 257, 267, 80 S. Ct. 724, 734, 4 L. Ed. 2d 697, 706)

should not be construed as expanding the conventional standing criteria to non-possessory cases. To so hold would render meaningless this Court's refusal in *Jones* to there address the issue of self-incrimination. Indeed, this Court noted that the chance that the allegations made in a motion to suppress could be used against the accused at trial was by no means an inevitable holding. *Id.* at 262.

As this Court stated in *Simmons* v. *United States,* 390 U.S. 377, 390, 88 S. Ct. 967, 974, 19 L. Ed. 2d 1247 (1968), ". . . there will be occasions, *even in prosecutions for non-possessory offenses,* when a defendant's testimony will be needed to establish standing." (Emphasis Added) *Simmons* thus resolved that issue, acknowledging that the Court in *Jones* relaxed the standing requirements to, in part, avoid having to there resolve the self-incrimination issue. This Court further noted in *Simmons* that:

> This Court has never considered squarely the question whether defendants charged with non-possessory crimes, like Garrett, are entitled to be relieved of their dilemma entirely. *Id.* at 391.

The Court there found it, ". . . intolerable that one constitutional right should have to be surrendered in order to assert another", thus rendering unnecessary for all time the propositions formulated in *Jones* as to possessory offenses. Thus, *Simmons* delivered the final death blow to the dilemma found so abhorrent in *Jones.*

To lend further support to respondents' argument on this point, this Court announced in *Brown* v. *United States,* 411 U.S. 223, 229, 93 S. Ct. 1565, 1569, 36 L. Ed. 2d 208 (1973), that it would reserve the question of the continued viability of the "automatic" standing doctrine of *Jones* (in light of *Simmons*) for a case involving a possessory offense.

Thus, this Court clearly indicated that *Jones* was to be viewed as applying only to possessory offenses, notwithstanding the Court's earlier dicta to the contrary in *Mancusi* v. *DeForte,* 392 U.S. 364, 368, fn. 5, 88 S. Ct. 2120, 2123, fn. 5, 20 L. Ed. 2d 1154 (1968).

That the "legitimately on the premises" theory had been rejected as an independent basis for standing is further evidenced by this Court's holding in *Brown,* that there was no reason to afford the *Jones*-type standing where there was no risk of either self-incrimination or prosecutorial self-contradiction. This Court noted in *Brown* that the vice of the latter would not necessarily warrant the survival of the former since *Simmons* had removed its dangers. 411 U.S. 223, 229, 93 S. Ct. 1565, 1569, 19 L. Ed. 2d 1247 (1968).

Here, as in *Brown,* the petitioners could have asserted a possessory interest in the property seized (sufficient to confer standing under the conventional rule) without any danger of self-incrimination or the vice of prosecutorial self-contradiction. But they did not do so. Here, as in *Brown,* there is simply no reason to afford *Jones*-type standing as there is no risk of either self-incrimination or prosecutorial self-contradiction. This case, as in *Brown,* involves a non-possessory offense and it is not necessary to confer standing on the basis of the petitioners' presence in the automobile which was searched since they could have established standing under the conventional rule.

II.

THE "DIRECTED AT" THEORY OF STANDING SHOULD BE REJECTED AS IT SEEKS TO FURTHER ENCROACH UPON THE PUBLIC INTEREST BY AN UNWARRANTED EXTENSION OF THE EXCLUSIONARY RULE.

The language of *Jones* v. *United States,* 362 U.S. 257, 261, 80 S. Ct. 725, 730-731, 4 L. Ed. 2d 697, 702 (1960), stating that to qualify as an aggrieved person one must have been a victim of a search, *one against whom the search was directed,* does not create an additional category of persons having standing. The phrase, *one against whom the search was directed,* is simply another way of describing a victim of a search or seizure. *Mabra* v. *Gray,* 518 F. 2d 512, 514 (7th Cir. 1975). ("The description of (1) 'a victim of a search' and (2) 'one against whom the search was directed' may be read as appositive." *Id.* fn. 2); *See also Sumrall* v. *United States,* 382 F. 2d 651, 654-655 (10th Cir. 1967), *cert. denied,* 389 U.S. 1055, 88 S. Ct. 806, 19 L. Ed. 2d 853 (1968).

To now fashion a new ground for standing under a "directed at" theory would do violence to the well established boundaries of the exclusionary rule. It would unbearably strain the Fourth Amendment. As this Court noted in *Alderman* v. *United States,* 394 U.S. 165, 174-175, 89 S. Ct. 961, 967, 22 L. Ed. 2d 176 (1969), ". . . we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest. . . ." Such a holding would annul the well established policy of this Court that, ". . . a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Id.* at 172.

It is submitted that there are no compelling public policy considerations to warrant such a radical departure, and the resulting expansion of the exclusionary rule, allowing *anyone* against whom illegally seized evidence *might* be used to object. The rights of those whose privacy has been truly invaded are adequately protected by this Court's decisions in *Jones, Brown, Simmons,* and *Alderman.*

Moreover, even if this Court were to adopt such a rule, it is submitted that the proof in this case is totally lacking to show that the search of the Clontz automobile was "directed at" petitioners. An individual fitting the general description of one of the armed robbers was observed exiting and later entering the vehicle which was searched. (A. 16-17, 20-21). A search of the petitioners' persons produced nothing. The search of the vehicle, which corresponded to the general description of the getaway car (A. 15-16, 20), was designed to obtain evidence relating to the armed robbery. It is, therefore, not accurate to describe the search of the automobile as one which was directed against petitioners.

CONCLUSION

For the foregoing reasons, respondents pray that the petitioners' convictions be affirmed.

Respectfully submitted,

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FOR ARGUMENT

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PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I.

PETITIONERS HAVE ASSERTED ACTUAL STANDING TO CONTEST THE SEARCH AS VICTIMS OF AN INVASION OF PRIVACY AND HAVE NOT, AS RESPONDENT ERRONEOUSLY ASSUMED, RELIED UPON THE "AUTOMATIC" STANDING RULE.

Respondent has incorrectly assumed, merely because the Petitioners have cited *Jones v. United States,* 362 U.S. 257,

80 S. Ct. 725, 4 L.Ed.2d 697, 78 ALR 2d 233 (1960) in support of their position, that they have relied upon the so-called "automatic" standing rule which arose from that decision. Respondent has thus overlooked the disclaimer to the contrary on page 8 of Petitioners' brief. Moreover, Respondent has, by convoluting the dual rationale of *Jones,* wrongly concluded that "automatic" standing and the legitimately-on-the-premises rule, which also arose from the *Jones* decision, are the same.

As most courts have concluded, there are two distinct types of standing recognized in *Jones.* One type is indeed "automatic" standing conferred upon a defendant who is charged with a crime which includes as an essential element possession of the evidence seized. There is, however, another totally separate type of standing discussed in *Jones,* recently termed "actual" standing which is accorded the victim of an "invasion of privacy." Among those suffering such an invasion of privacy are individuals, like Petitioners, who were legitimately on the premises when the search occurred. *See* the discussion in *United States v. Cella,* 568 F.2d 1266, 1280 (9th Cir., 1977).

Notwithstanding Respondent's claim, this Court's decision in *Brown v. United States,* 411 U.S. 223, 93 S. Ct. 1565, 36 L.Ed.2d 208 (1973), involving defendants who were not present on the premises when the contested search and seizure occurred, most certainly did not bring into question the second aspect of *Jones, i.e.,* the legitimately-on-the-premises rule. In obvious contrast to its analysis of "automatic" standing, the *Brown* opinion recognized the legitimately-on-the-premises rule as an independent rule of standing:

> Presence of the defendant at the search and seizure was held, in *Jones,* to be a sufficient source of standing *in itself.* (emphasis added). 362 U.S. 223, 227 [footnote 2], 93 S. Ct. 1565, 1568, 36 L.Ed.2d 209, 213.[1]

In addition, the holding in *Simmons v. United States,* 390 U.S. 377, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968), which excluded as trial evidence any testimony given by a defendant during a pretrial hearing to establish his standing, did nothing to undermine the legitimately-on-the-premises rule. To be sure, the *Simmons* doctrine may have partially alleviated the so-called "dilemma" addressed in *Jones*; but, even if the effect of *Simmons* was to make the first basis for standing outlined in *Jones* unnecessary (*i.e.,* "automatic" standing), the second *Jones* basis, the legitimately-on-the-premises rule, remains inviolate. The legitimately-on-the-premises rule was formulated not to respond to the "dilemma" at which automatic standing was directed but to establish the right of privacy rather than property concepts as the core of Fourth Amendment protection. Accordingly, it remained unaffected by *Simmons.* [It is of particular interest that all of the cases cited in footnote 1, wherein the continuing validity of the legiti-

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[1]Several other opinions of this Court since *Jones* have also recognized the continuing validity of the legitimately-on-the-premises rule as an independent ground for standing. *E.g., Combs v. United States,* 408 U.S. 224, 227 [footnote 4], 92 S. Ct. 2284, 2286, 33 L.Ed.2d 308, 311 (1972); *Alderman v. United States,* 394 U.S. 165, 172 [footnote 7], 89 S. Ct. 961, 966, 22 L.Ed.2d 176, 186-187 (1969); *Spinelli v. United States,* 393 U.S. 410, 412 [footnote 2], 89 S. Ct. 584, 587 21 L.Ed.2d 637, 641 (1969); *Mancusi v. DeForte,* 392 U.S. 364, 368 [footnote 5], 88 S. Ct. 2120, 2123, 20 L.Ed.2d 1154, 1159 (1968).

mately-on-the-premises rule was recognized, were decided after *Simmons.*][2]

II.

RESPONDENT'S ARGUMENT REGARDING THE POTENTIAL EFFECT OF THE DIRECTED-AT THEORY IS EXAGGERATED, AND ITS CONCLUSION THAT THE PETITIONERS WERE NOT THE TARGETS OF THE CONTESTED SEARCH IS CONTRARY TO WHAT THE RECORD OF TRIAL SHOWS.

Respondent has made both a policy argument and a factual argument against Petitioners' reliance upon the

[2]Apparently, Respondent believes that the instant Petitioners should be placed in the same position as the defendant in *Simmons* (Garrett), who was not present at the time of the search in that case and thus was forced to claim a proprietary interest in the objects seized in order to establish his standing. This is illogical, in Petitioners' view, because they had an expectation of privacy, aside from proprietary interests, which the *Simmons* defendant lacked. In any event, while Petitioners did agree that they did not own the automobile, they were never asked whether they had any ownership of the gun or other items seized during the search. Their appointed counsel stated in argument: ". . . I don't think they have to admit these are their items. I think they do have a standing which they have shown" (A23). Assuming *arguendo* that the Public Defender was wrong in this regard, Petitioners should not have to suffer the consequences of their attorney's mistake. After all, the prosecutor did not file a written motion attacking Petitioners' standing prior to the suppression hearing, and the trial court denied the Public Defender's request for time to research the points raised orally by the prosecutor. Hence, the defense should still be afforded a chance to properly establish standing assuming this has not already been done, *c.f. Combs v. United States,* 408 U.S. 224, 92 S. Ct. 2284, 33 L.Ed.2d 308 (1972) where the case was remanded for further proceedings on the question of petitioner's standing.

directed-at theory as a second ground for their standing. Both of its arguments, however, are based upon faulty premises.

Regarding its policy argument, Respondent reasoned that the directed-at theory would allow "*anyone* against whom illegally seized evidence *might* be used to object" (Respondent's brief at page 8 — emphasis in original). This reasoning, of course, is incorrect because the directed-at theory, like other accepted tests for standing, is limited in applicability. In order to challenge the admissibility of evidence under the directed-at theory, one would have to establish that he was, in fact, the target of the disputed search. Respondent, though, erroneously assumed the theory would somehow confer standing upon "anyone" who wished to contest an illegal police search and, for that reason, has grossly exaggerated the potential effect of the directed-at theory.

Respondent has likewise made a factual error in its brief by claiming, on page 8, that the search at issue was not really directed at Petitioners. It was apparently Respondent's logic that since the automobile in which Petitioners were riding corresponded to the general description of the robbers' getaway car, the object of the search was the automobile itself rather than its occupants. One might refute this claim in several ways, but it is perhaps sufficient to simply note that, according to the record of the trial, the car in which Petitioners were riding was not the getaway car, and the police were fully aware of that fact prior to the search.

It should be explained that the car used by the robbers to make their getaway was stolen from one of the victims of the robbery. Consequently, the police were initially on the look-out for this car, having its general description and a

partial license number. At the suppression hearing, Officer Sollers testified that his attention was drawn to the automobile occupied by Petitioners because it was the same make and model as the stolen getaway car, *i.e.*, a Plymouth Roadrunner (A15-16). However, the similarity between the two vehicles served no further purpose because, as Sollers made clear in his trial testimony, he learned from a radio report shortly after sighting the automobile that the true getaway car had already been recovered (R193). Moreover, he later "ran a license check" on the vehicle he had spotted, in which Petitioners were riding, and was informed of the owner's name which obviously was not that of the robbery victim to whom the getaway car belonged (R194). This too was accomplished before the stop and search. Therefore, once this information became known to the police, no suspicions surrounded the automobile in which Petitioners were riding, and the sole reason for the contested police action had to be the lingering suspicion of the police that Petitioners might still be the robbers. It cannot be reasonably claimed, then, that the search was directed at any person or object other than Petitioners.[3]

[3]The full sequence of events, according to Officer Soller's trial testimony, was as follows: Sollers, while watching the highway from a parking lot 4½ miles north of the robbery site, noticed the automobile in which Petitioners were riding about 10 to 15 minutes after receiving a radio report of the robbery. He then followed this automobile to a lounge where he watched Petitioners and their female companions enter. But, since the license number of their automobile did not match that of the getaway car, Sollers returned to the highway momentarily to continue his lookout for the getaway car. Next, following another wait of 5 to 10 minutes, he overhead a radio call announcing the recovery of the abandoned getaway car. So, Sollers decided to go back to the lounge, thinking the robbers might have changed vehicles; and it was at this point that he telephoned the Sheriff's office for a better description of the robbers and for a "license check" on the automobile. Thereafter, Petitioners and their companions left the lounge and proceeded southbound on the highway toward the robbery site near which the stop and search was conducted (R191-197).

III.

THE *AMICUS CURIAE* HAS INCORRECTLY CONCLUDED THAT PETITIONERS SEEK TO EXPAND THE SCOPE OF THE EXCLUSIONARY RULE, AND ITS FACTUAL VIEW OF THIS CASE IS BASED UPON AN INCOMPLETE READING OF THE TRIAL RECORD.

Contrary to the brief of the *amicus curiae*, Petitioners do not seek to expand the scope of the exclusionary rule by conferring standing upon a class of persons whose Fourth Amendment rights were not directly violated. Petitioners' Fourth Amendment rights were, in fact, violated because they had a reasonable expectation of privacy flowing from their legitimate presence in the Clontz automobile; thus, they were victims of an invasion of privacy. (See subsection I.C. of the Argument portion of the Brief for Petitioners and cases cited therein, particularly those in footnote 5 on page 13). It follows that Petitioners are not seeking an expansion of the scope of the exclusionary rule.[4]

Alternatively, the *amicus curiae* has advanced a new means of defeating standing, a sort of "police good faith" test, wherein standing to challenge a Fourth Amendment violation would be allowed only if the disputed police conduct was "wilful and flagrant". This theory, of course, is not supported by authority and is illogical since police motivation is a factor to be considered on the ultimate issue

[4]Because the Petitioners are not seeking an expansion of the scope of the exclusionary rule, they do not perceive that the policy aspects of the exclusionary rule touched upon in subsection I.B. of the *amicus'* Brief are drawn into question in this case.

of whether the search was illegal, not on the question of standing. In any event, the *amicus*' conclusion that the police acted in good faith here is based upon an incomplete reading of the record. As has been noted herein in reply to Respondent's similar argument, the police no longer suspected at the time of the stop and search that the automobile in which Petitioners were riding was the robbers' getaway car. [*See* footnote 3]. Thus, the police were not acting in good faith, and the Petitioners' standing survives even the novel test posited by the *amicus* itself.

CONCLUSION

For the reasons stated, it is asserted that the state court's erroneous judgment, that Petitioners lacked standing, should be reversed and the case remanded for a determination as to the legality of the search which the Petitioners sought to challenge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-5781

FRANK L. RAKAS AND LONNIE L. KING,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE RESPONDENT, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

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IN THE

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vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT.

Americans for Effective Law Enforcement, Inc. respectfully moves this Court for leave to file a brief, *amicus curiae*, in support of the respondent in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The respondent has consented to our filing; the petitioner has not consented to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. Letters from counsel for the petitioner and the respondent have been filed with the Clerk of this Court. The interest of the *amicus curiae* and our reasons for desiring to file are set forth below.

INTEREST OF AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal law.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The interests of *amicus* in the instant case stem from the importance of the issue involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement nationwide. The issue involved in this case is whether or not standing to object to an allegedly illegal search and seizure should be accorded to individuals against whom evidence was seized from the car in which they were passengers.

If standing were to be accorded to the petitioner it would result in a major, and in our view unwarranted, expansion of the Exclusionary Rule. We will seek to point out to the Court reasons why any such expansion would have a direct and adverse effect on the enforcement of the criminal law.

Accordingly, *amicus* respectfully moves this Court for leave to file our brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF THE RESPONDENT.

ARGUMENT.

I.

THE SCOPE OF THE EXCLUSIONARY RULE SHOULD NOT BE EXPANDED BY ACCORDING STANDING TO PETITIONERS' OBJECTION TO AN ALLEGEDLY ILLEGAL SEARCH OF ANOTHER'S AUTOMOBILE.

Amicus will not reiterate the legal arguments made by Respondent State of Illinois in the instant case, although we agree with them and wish to associate ourselves with them. We will confine our argument to the issue which we believe involves the most important policy consideration in this case: whether the Exclusionary Rule should be expanded to en-

compass those whose Fourth Amendment rights have not directly been violated.

The issue of the continued viability of the Exclusionary Rule, as such, is not before this Court in the instant case; consequently we will not address our argument to those cases in which the Rule is applied as a sanction when the party actually aggrieved by an illegal search seeks to suppress evidence against him.

We submit, however, that to grant standing to invoke the Rule to Petitioners Rakas and King would bring about an unwarranted *expansion* of the scope of the Rule and that valid criminal justice policy considerations militate against such an expansion.

Our argument, which will be brief, can be summarized as follows:

1. To grant standing in cases such as this would greatly expand the scope of the Exclusionary Rule.
2. In a period of growing disenchantment with, and of doubt about the efficacy of, the Rule, such an expansion would be unwarranted.
3. The instant case, in particular, is not such a case as would demand expansion of the Rule.

We believe that these policy considerations, underlying the sound legal arguments made by Respondent State of Illinois, contribute to the necessity for affirmance in the instant case.

A. To Grant Standing in Cases Such as This Would Greatly Expand the Scope of the Exclusionary Rule.

Mr. Justice White, writing for the majority of the Court in *Alderman* v. *United States,* 394 U. S. 165 (1969), enunciated the rule relating to standing to contest an illegal search and seizure:

> The established principle is that the suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. 394 U. S., at 172.

Thus, the *scope* of the suppression doctrine is limited to those actually aggrieved by the violation of Fourth Amendment rights. This limitation, we submit, is grounded on the soundest public policy reasons. Any other interpretation of the Exclusionary Rule would result in a broadening of the scope of the Rule which would have the most adverse effect upon the criminal justice system.

Many searches and seizures involve a single party: a lone bandit in his getaway car, one in possession of narcotics alone in his apartment, a single individual on the street with an unlawful firearm on his person and so on. Other searches and seizures, however, involve multi-criminal operations: holdup gangs, terrorists and organized crime conspiracies and narcotics distribution rings are but a few examples.

If the Exclusionary Rule were to be expanded so that *anyone* against whom illegally seized evidence might be used could object to its admission, the number of suppression hearings would be multiplied by a factor of as many individuals who were party to any griven criminal action and who might be incriminated.

This would, of course, place an additional burden upon our already overburdened courts; but, more importantly, any such expansion would exact a high price from our criminal justice system.

The fact of this expansion, and its impact upon the system was recognized by this Court in *Alderman, supra:*

> . . . we are not convinced that the additional benefits of extending the Exclusionary Rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which expresses the truth. 394 U. S., at 174.

Common sense dictates that if standing to object to the use of illegally seized evidence were extended to parties other than those actually aggrieved by the search and seizure, the boundaries of the Exclusionary Rule would be increased immeasurably. The question then arises whether this extension would benefit the system.

B. In a Period of Growing Disenchantment with, and Doubt About the Efficacy of, the Exclusionary Rule, Its Expansion, Based on Standing, Would Be Unwarranted.

There is surely no more controversial doctrine in the field of criminal justice today than the Exclusionary Rule. The Rule mandates that evidence of crime, no matter how relevant and probative of guilt it may be, must be excluded at the trial of the individual from whom it was seized if law enforcement officers violated that individual's Fourth Amendment rights in searching for and seizing[1] such evidence.

The Rule was imposed in federal cases, by this Court under its supervisory power over federal courts, in *Weeks* v. *United States*, 232 U. S. 383 (1914); and upon the states, as a doctrine of Constitutional dimension, in *Mapp* v. *Ohio*, 367 U. S. 643 (1961). The primary rationale for the Rule was that suppression of the products of Fourth Amendment violations would deter law enforcement officers from committing them.[2]

We need only summarize the arguments against the continued viability of the Exclusionary Rule. This Court is well aware of

1. As this is a search and seizure case we will confine our argument to the Fourth Amendment issues which involve the Exclusionary Rule.

2. Another rationale for the Rule was the "imperative of judicial integrity", that is, that courts should not permit the government to profit from the illegal acts and/or the mistakes of its officers. Mr. Justice Powell analyzed this in *Stone* v. *Powell*, 428 U. S. 465 (1976) and found this theoretical basis for the Rule wanting in cases not involving suppression of evidence in the criminal trial of the party actually aggrieved. 428 U. S. 465, at 485. He noted standing in particular as an area in which public policy outweighed the benefits of expanding the scope of the Rule. *Ibid* at 489.

them and, indeed, several Justices have expressed disillusionment with the Rule and its impact.[3]

Literature critical of the Rule, from every aspect of the ideological spectrum in the criminal justice system abounds.[4]

3. See, *e.g.*, *Bivens* v. *Six Unknown Named Federal Agents*, 403 U. S. 388 (1971), Burger, C. J., dissenting. *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), Blackmun, J., joining in Mr. Justice Black's dissenting opinion. *Stone* v. *Powell*, *Wolff* v. *Rice*, 428 U. S. 465 (1976), Powell, J., majority opinion; White, J., dissenting opinion.

4. See, for example Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People* v. *Cahan*, 43 Calif. L. Rev. 565 (1965); Burns, *Mapp* v. *Ohio: An All-American Mistake*, 19 DePaul L. Rev. 80 (1961); Cox, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 Sw. U. L. Rev. 68 (1972); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 951-954 (1965); Satlin, *An Alternative to the Exclusionary Rule*, 26 JAG J. 255 (1972); Inbau, *Restrictions in the Law of Interrogations and Confessions*, 52 Nw. U. L. Rev. 77 (1958); Inbau, Thompson and Sowle, *Cases and Comments on Criminal Justice: Criminal Law Administration*, 1-84 (1968); Lafave, *Improving Police Performance Through the Exclusionary Rule (pts. 1 and 2)*, 30 Mo. L. Rev. 391, 566 (1965); Lafave and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 Mich. L. Rev. 987 (1965); Morris & Hawkins, *The Honest Politician's Guide to Crime Control*, 101 (1970); *Effect of Mapp* v. *Ohio on Police Search and Seizure Practice in Narcotics Cases*, 4 Colum. J. L. and Soc. Prob. 87 (1968); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Plumb, *Illegal Enforcement of the Law*, 24 Cornell L. Q. 337 (1939); Schaefer, *The Fourteenth Amendment and the Sanctity of the Person*, 64 Nw. U. L. Rev. 1 (1969); *Student Comments: The Tort Alternative to the Exclusionary Rule in Search and Seizure*, 63 J. Crim. L., C. and P. S. 256 (1972); Waite, *Judges and the Crime Burden*, 54 Mich. L. Rev. 169 (1955); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A. B. A. J. 479 (1922); 8 Wigmore, *Evidence*, section 2184a (McNaughton rev., 1961); Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 Sw. L. J. 573 (1971); *The Exclusionary Rule Regarding Illegally Seized Evidence: An International Symposium*, 52 J. Crim. L., C. and P. S. 245-292 (1961); Vance, *Why the Exclusionary Rule Should Be Modified*, The Prosecutor, Vol. 7, No. 5, p. 399 (1971); Rosenblatt and Rosenblatt, *A Legal House of Cards*, Harper's, July 1977, p. 16; Miles, *The Ailing Fourth Amendment: A Suggested Cure*, 63 A. B. A. J. 365 (1977).

We especially commend to the Court a recent book, Schlesinger, *Exclusionary Injustice, The Problem of Illegally Obtained Evidence*, New York, Marcel Dekker, Inc. (1977).

This criticism is premised for the most part on the fact that there is little or no empirical evidence that the application of the Rule actually deters illicit police conduct, and the fact of the high cost to society of the inflexible exclusionary doctrine: the suppression of the truth in the factfinding process.

With regard to the deterrent or non-deterrent effect of the Rule, the language of Mr. Justice White dissenting in *Stone* v. *Powell, supra,* is instructive:

> . . . as time went on after coming to this bench, I became convinced that *Weeks* v. *United States,* [citations omitted], and *Mapp* v. *Ohio* had overshot their mark insofar as they aimed to deter lawless action by law enforcement personnel and that *in many of its applications the exclusionary rule was not advancing that aim in the slightest* and that in this respect it was a senseless obstacle to arriving at the truth in many criminal trials. 428 U. S. 465 at 537-538. (Emphasis supplied.)

Recent studies suggest that there is no empirical evidence for the deterrent effect of the Rule.[5] We submit, however, that, in addition to empirical studies, principles of common sense and logic dictate that the theoretical case for deterrence is shaky.

For a deterrent to be effective, the person subject to that deterrent must know with reasonable certainty just what conduct on his part is liable to the sanction involved. Three conditions, common to most search and seizure situations, militate against a law enforcement officer having such certainty:

1. He is generally untrained in the law, with the exception of what he has learned in the training academy or picked up on the street;[6]

5. Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 2 Journ. Legal Studies 243 (1973); but cf. Cannon, *Is the Exclusionary Rule in Failing Health: Some New Data and a Plea Against a Precipitous Conclusion,* 62 Ky. L. Rev. 349 (1974).

6. See, *Bivens, supra,* Burger, C. J., dissenting: "Policemen do not have the time, inclination or training to read and grasp the

(Footnote continued on next page.)

2. The law of search and seizure has developed into such a convoluted and complex state that judges of different courts, or even judges sitting on the same court, cannot agree about it;[7] and,
3. Many search and seizure decisions are made by officers acting under the exigencies (and sometimes the dangers) of "on-the-street" police work; these situations leave little time for contemplation of abstract Fourth Amendment principles.

Given these conditions, we can postulate that, in a large number of instances, unless the case is so clear that an officer *knows with certainty* that his conduct is illegal (a rarity in search and seizure law) he will act in the good faith belief that his conduct is reasonable, and necessary, thus negating in large measure any deterrent effect of a later suppression of the evidence.

Mr. Justice White, dissenting in *Stone* v. *Powell, supra,* described some of the numerous variables which confront police officers in search and seizure situations and then concluded: "In any of these situations, which occur repeatedly, when the officer is convinced that he has probable cause to arrest he will very likely make the arrest." 428 U. S., at 538-539.

Against this background of very realistic doubt as to a meaningful deterrent effect of the Exclusionary Rule must be weighed the cost to society of its application. This was summed up by Mr. Justice Powell in *Stone* v. *Powell, supra*:

> The costs of applying the Exclusionary Rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, is

(Footnote continued from preceding page.)

nuances of the appellate opinions that ultimately define the standards of conduct that they are to follow." 403 U. S. 388, at 417.

7. *Ibid.* "The issues that [search and seizure] decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not 'reasonable' amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity."

> diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.
>
> * * * * *
>
> Application of the rule thus deflects the truthfinding process and often frees the guilty. 428 U. S., at 489-490. [Footnotes omitted.]

The lack of deterrence—cost to society dichotomy in the Exclusionary Rule controversy has been the basis of numerous decisions of this Court which have refused to expand the scope of the Rule beyond the trial and direct appeal of the individual actually aggrieved by the Fourth Amendment violations.[8] We submit that given the speculative nature of the Rule's deterrent effect and the acknowledged corrosive effect of its application in our criminal justice system, the granting of standing to Petitioners Rakas and King would be a totally unwarranted expansion of the scope of this much-discredited doctrine.

C. The Instant Case in Particular Is Not the Sort of Case That Would Mandate the Expansion of the Exclusionary Rule.

A major criticism of the Exclusionary Rule is its inflexibility. Mr. Chief Justice Burger, dissenting in *Bivens, supra,* precisely described this anomaly of the Rule:

> Although unfortunately ineffective, the Exclusionary Rule has increasingly been characterized by a single, monolithic and drastic judicial response to all official violations

8. *Linkletter* v. *Walker,* 381 U. S. 618 (1965), the Exclusionary Rule is not to be applied retrospectively; *Walder* v. *United States,* 347 U. S. 62 (1954), government may use illegally seized evidence to impeach a defendant's credibility; *U. S.* v. *Calandra,* 414 U. S. 338 (1974), illegally seized evidence may be used in grand jury proceedings; *U. S.* v. *Janis,* 428 U. S. 433 (1976), illegally seized evidence may be used in civil proceedings; *U. S.* v. *Ceccolini,* ..... U. S. ....., 22 Cr. L. 3063, 3070 (1978), living witness testimony which was a "fruit" of an illegal search may be used in a perjury conviction.

> of legal norms. Inadvertent errors of judgment that do not work any injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine*-type violations of the Fourth Amendment. 403 U. S., at 418.

Our contention in the previous section was that now is not the time to expand the scope of the Exclusionary Rule; however, if such expansion *is* contemplated by extending standing, we submit that the distinction between wilful and flagrant violations on the one hand and "honest mistakes" on the part of law enforcement officers on the other should be of critical importance.

The facts of the instant case indicate that the officers were acting in complete good faith. Indeed, the officers' actions in this case could be considered an example of alert and effective police work.

The robbery took place at about 8:30 p.m. on February 4, 1975, clearly during nighttime hours.[9] (R. 138.) About 15 minutes later Officer Sollers received a radio call describing the getaway car as a blue Plymouth Road Runner with a certain license plate. (R. 114, 120, 123, 192.) Some ten minutes later he spotted a purple Plymouth Road Runner with a different license plate approximately four and a half miles from the robbery scene. (R. 120-121, 191-192, 207-208.) Two males, wearing ski-masks had committed the robbery; two males and two females were in the automobile that Officer Sollers saw. (R. 113-114, 121-125.)

Proximity in time and space were clearly established; with regard to the description of the automobile, an experienced police officer could have considered two things:

1. Witness' descriptions of the color of a getaway car often vary significantly depending upon the perception of colors, and, especially at night, under artificial lighting, a purple car could well have appeared blue.

9. Citations to the trial court transcripts will contain the prefix "R".

2. It is extremely common for robbers to wire (or otherwise temporarily affix) one set of license plates over their real plates in order to confuse pursuers.

Thus, it was certainly reasonable for Officer Sollers to believe that the subject car might be the getaway car.[10] He followed the car until it stopped at a lounge and observed the occupants leave the car and enter the lounge. (R. 113, 115.) He then called the Sheriff's Office, another indication that the officer was doing everything in his power to establish that the car was, in fact, the getaway car.

Officer Sollers learned from the Sheriff's Office that one of the male suspects, wearing a blue shirt, matched the limited description given of one of the robbers. (R. 116.) Other officers were called to assist Officer Sollers by the dispatcher, and Officer Sollers then stopped and searched the car after it left the lounge. The fact that other officers were summoned to assist is further evidence of the good faith belief of the police that they were dealing with armed robbers; good police practice demands that an officer be assisted if possible when dealing with potentially dangerous and armed men.

Based upon his observations and other information made available to him, it appears clear that the officer's good faith belief that a crime had been committed, and that at least two of the persons to be stopped committed it, was reasonable. His only other option would have been to "shrug his shoulders and allow a crime to occur or a criminal to escape,"[11] which the law does not require him to do.[12]

10. Whether there was, in law, probable cause to stop and search the car has not been determined because of the lower court's ruling that Petitioners had no standing to object to the introduction of the rifle. Our analysis of the facts is being made for the purpose of demonstrating good faith rather than to attempt to establish probable cause in the legal sense.

11. *Adams* v. *Williams*, 407 U. S. 143, at 145.

12. "Neither officers nor judges issuing arrest warrants need delay apprehension of the suspect until unquestioned proof against him is accumulated. The officer may be shirking his duty if he does so." *Stone* v. *Powell*, 428 U. S. 465, at 539, White, J., dissenting.

From the foregoing analysis, we submit that there can be no question that the stop and search was not a wilful or flagrant Fourth Amendment violation.

It is precisely in such cases that the rationale for the Exclusionary Rule fails. As Mr. Justice White pointed out in his dissenting opinion in *Stone* v. *Powell, supra:*

> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, *the exclusion can have no deterrent effect*. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted. 428 U. S., at 539. (Emphasis supplied.)

Thus, given the facts and circumstances of the instant case, any extension of the scope of the Exclusionary Rule by according standing to the petitioners would be unwarranted and would do little or nothing to safeguard Fourth Amendment rights.

CONCLUSION.

Any increase in the number of persons accorded standing to contest an allegedly illegal search and seizure would drastically expand the scope of the Exclusionary Rule. The Rule is ineffective in good faith cases such as this, and it exacts too high a price from society by suppressing the truth and freeing the guilty. Consequently, such an expansion would be unwarranted.

For the foregoing reasons we urge this Court to affirm the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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